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In The

Supreme Court of the United States

ACE AUTO BODY & TOWING, LTD.; ATLAM TOWING SERVICE, INC.; BANGS TOWING, INC.; BEN'S TOWING SERVICE; BILLS TOWING SERVICE, INC.; BRAGG TOWING CO.; BROADWAY AUTO SERVICE, INC.; C&J COLLISION SERVICE, INC.; CHARLES SCHMIDT AND SONS, INC.; CHESTER'S HIGHWAY GARAGE OF PW, INC.; CK TOWING, INC.; DAVE'S HEAVY TOWING, INC.; DO-RITE RELIABLE TOWING, INC.; EFFICIENCY ENTERPRISE, INC.; EAST COAST INDUSTRIAL UNIFORM CORP.; F&B TRUCK REPAIR & MAINTENANCE, INC.; GALASSO TRUCKING, INC.; GESCO ICE CREAM VENDING CORP.; HENDRICKSON TOWING, INC.; KENNY'S FLEET MAINTENANCE, INC.; LEONARD AUTO BODY; MARJAM SUPPLY CO., INC.; MODEL TOWING & RECOVERY, INC.; MURRAY RUDE SERVICES, INC.; PARKVIEW TOWING CORP.; PLAZA AMBULETTE SERVICE, INC.; RAPID ARMORED CORPORATION; SUNNY DAY ENTERPRISE INDUSTRIES, LTD.; TOMMY BUG AUTO REPAIRS, INC.; ULTIMATE TRANSPORT, INC.; ZANT PRE INC., doing business as presant glass,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1- Whether 49 U.S.C. § 14501(c), as enacted by Congress, preempted all regulation of motor carrier safety by local governments and all State and local government regulation of motor carrier routes and service and most prices, as the Court of Appeals for the Eleventh Circuit has held, or, as held by the Court of Appeals for the Second Circuit, the statute implicitly permits motor carrier safety regulation to continue being exercised by local government.

2- If the Court of Appeals for the Eleventh Circuit is correct that 49 U.S.C. § 14501(c) preempted all motor carrier safety regulation by local government and all State and local government regulation of motor carrier routes and services and most prices, to what extent, if any, does local government retain authority under its inherent police powers to regulate motor carrier services.

3- If the Court of Appeals for the Second Circuit is correct, that the expressed preservation of authority to the States to enact and enforce laws regulating motor carrier safety under 49 U.S.C. § 14501(c)(2) implicitly allows such authority to be delegated to local government, to what extent, if any, may such authority be used by local government or by a State to supercede and preempt motor carrier competition and thereby deprive the shipping public of the choices Congress intended for them to have when making the selection of a motor carrier, without constituting the taking of a property right.

PARTIES TO THE PROCEEDING

All of the parties who participated in the proceedings before the Court of Appeals are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

The thirty-two Petitioners named in the Caption ("Ace"), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Ace Auto Body & Towing, Ltd., et al. v. The City of New York*, Nos. 97-9499, 97-9551, 1999 WL 166512 (2d Cir. 1999). The opinion of the United States District Court for the Southern District of New York is reported at *Ace Auto Body & Towing, Ltd., et al. v. City of New York*, No. 96 Civ. 6547 (DLC), 1997 WL 669891.

STATEMENT OF JURISDICTION

The date of the entry of the judgment or decree sought to be reviewed is March 26, 1999. On that date the United States Court of Appeals for the Second Circuit affirmed the judgment of the United States District Court for the Southern District of New York which had held that 49 U.S.C. § 14501(c) does not preempt the New York City ("the City") laws regulating the segment of the motor carrier industry here involved, except with regard to the rates for consensual service (thereby granting Ace's motion for summary judgment with respect to its consensual rate claim, but denying it in all other respects, and

granting the City's motion for summary judgment, except with regard to the consensual rate claim).

The statutory provision which confers jurisdiction on this Court to review the judgment or decree in question by writ of certiorari is 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution (Article 6, Clause 2) from which the doctrine of preemption derives, provides for federal law superseding contrary and conflicting State and local law.

Express preemptive language is contained in *Federal Aviation Administration Authorization Act of 1994*, which was amended by the *ICC Termination Act of 1995*, is codified at 49 U.S.C. § 14501(c), and provides in relevant part:

> § 14501
>
> (c) Motor carriers of property. –
>
> (1) Except as provided in paragraph (2) . . . a State, political subdivision of a State, . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.
>
> (2) Matters not covered. – Paragraph (1) –
>
> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, . . . or the authority of a State to regulate

with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

(B) . . . .

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

STATEMENT OF THE CASE

A. Statement of Facts

For many years the segment of the motor carrier industry providing intra-city and inter-city towing services originating within New York City has been subject to economic as well as safety regulation by the City. Both the business entity and the vehicle operators have been required to be specially licensed, and to pay licensing fees every two years. They are subjected to criminal background checks, required to post bonds to assure the payment of fines for violations, to display particular information on trucks, to comply with record keeping and reporting requirement.

Then, effective in 1995, Congress enacted what became codified as 49 U.S.C. § 14501(c), a law designed to essentially deregulate economic regulation of the motor carrier industry, preempting all State and local economic

regulation of for-hire motor carriage, in order to encourage competition in the motor carrier industry and the free flow of commerce. These enactments are part of the *Federal Aviation Administration Authorization Act of 1994* ("the FAAA Act"), which was amended the following year, as part of the *ICC Termination Act of 1995* ("the ICC Termination Act").

Notwithstanding the preemption imposed under § 14501(c), the City not only continued to enforce its existing economic and safety laws regulating that segment of the motor carrier industry serviced by, participated in, or affecting one or another of Petitioners, it enacted new laws restricting the ability of those of the Petitioners who are members of the shipping public, from exercising their freedom to select the carrier of their choice; and restricting the ability of those Petitioners who are motor carriers, to compete for business.

Under one or another of its accident management programs, ostensibly adopted to eliminate the perceived hazard of towers chasing to the scene of accidents it the hopes of obtaining a towing job, or perhaps a gratuity from one or another auto-body repair shop, the owner or operator of the damaged vehicle is now prevented by municipal law from calling-her-own-tow. That is, the operator or owner of the damaged vehicle is not permitted, anywhere in the city, to accept the services of any towing company but the one called to the scene by the police.

City licensed towing companies with contracts with individuals or fleet owners, but who do not choose to participate, or do not qualify under the City criteria to

participate, in the program are precluded entirely and completely from competing for the business of towing accident disabled vehicles, even to the extent of servicing their own customers.

As a result, Petitioners joined together to challenge the City's entire regulatory scheme.

B. The Proceedings Below

This lawsuit was commenced in 1996, seeking declaratory and injunctive relief against enforcement of the City's entire scheme of regulation. Preliminary injunctive relief was also sought against enforcement of those enhanced laws said to deprive the public of competing services. The District Court denied the preliminary injunctive relief by Order dated April 25, 1997. The parties then cross-moved for Summary Judgment and by Opinion filed October 27, 1997, the District Court denied Petitioners' motion and granted the City's motion, except to the limited extent described above, (under "Jurisdiction") essentially finding that the City's laws were not preempted by 49 U.S.C. § 14501(c).

The parties then filed cross-appeals, which were decided by Opinion of the Court of Appeals dated March 26, 1999, from which this Petition seeks relief.

REASONS FOR GRANTING THE WRIT

A- THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE COURT OF APPEALS FOR THE SECOND CIRCUIT AND THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

By its Opinion filed October 23, 1998, and reported at *R. Mayer of Atlanta, Inc., et al. v. City of Atlanta, Georgia* (*City of Atlanta*), 158 F.3d 538 (11th Cir.1998), the Court of Appeals for the Eleventh Circuit held that the safety exception to the preemption contained in 49 U.S.C. § 14501(c) is restricted to safety regulation by the State and cannot be exercised or otherwise delegated to local government, thereby striking down the City of Atlanta's ordinance regulating the towing segment of the motor carrier industry.

The Opinion of the Court of Appeals for the Second Circuit, filed March 26, 1999, and to which this Petition is directed, specifically conflicts with the conclusions of the Eleventh Circuit, holding instead the regulatory authority expressly reserved to the States by § 14501(c)(2)(A) may implicitly be delegated by States to their political subdivisions.

On March 29, 1999, the Court denied the petition of the City of Atlanta for a writ of certiorari to the Eleventh Circuit's decision, and on May 24, 1999, it denied the City of Atlanta's petition for rehearing of the March 29, 1999 denial, which Atlanta had in reliance on the Second Circuit's decision in the instant matter.

The Eleventh Circuit in *City of Atlanta, supra,* correctly analyzed the scope of 49 U.S.C. § 14501(c)'s

preemption, holding that its safety exception can only be exercised by a State and neither extends to nor can be delegated to local government. In reaching its conclusion, the Eleventh Circuit understood that the impact of its statutory interpretation would ultimately affect the entire motor carrier industry and was therefore not focused solely on the towing segment of the motor carrier industry which was the subject of Atlanta's ordinance.

The Second Circuit, below, took a much narrower view of the preemption imposed by 49 U.S.C. § 14501(c), which Petitioners assert was strongly influenced by the court's willingness to perceive that the scope of its decision would have only localized impact:

> [W]e hesitate to construe the text of § 14501 so as to frustrate unnecessarily the ability of municipalities to respond to the local safety concerns created by local towing industries.

App. 21, 22.

The necessity for the Court's resolution of the divergent views on the authority of State versus local motor carrier safety regulation expressed by the Second and Eleventh Circuits is paramount. There is a great likelihood not only for the motor carrier industry, in general, to be adversely affected by the wholesale imposition of a patch quilt of local regulation if other communities are now encouraged to introduce their own motor carrier regulatory schemes in reliance on the Second Circuit's view, but also for further conflict among the other Circuits. For example, the Court of Appeals for the Fifth Circuit currently has before it the cases of *Cardinal Towing & Auto Repair, Inc., et al. v. City of Bedford, Texas, et al.*, No.

98-10194, and *Brenda L. Stuckey d/b/a Bill's Wrecker Service et al. v. City of San Antonio*, No. 98-50934, while the Ninth Circuit has before it the case of *Patrick P. Tocher d/b/a Pacific Coast Motoring v. City of Santa Ana et al.*, No. 97-55628.

The Second Circuit incorrectly ignored the clear and plain meaning of the statute which must result from Congress' exclusion of any reference to "political subdivisions" within § 14501(c)(2)(A), in clear contrast to the inclusion of the reference to "political subdivisions" in each and every other subsection of § 14501. In the event Congress intended for the safety authority to be exercised by political subdivisions as well as by States, notwithstanding the clear language and plain meaning of the statute, the remedy is solely for Congress to make and not for the courts to impose through *de facto* legislation. Clearly, "when Congress omits certain language in a particular subsection of a statute, the omission is intentional rather than accidental." *City of Atlanta, supra*, 158 F.3d at 545, citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994).

The preemption language set forth in § 14501(c) is virtually identical to the preemption provision found in the *Airline Deregulation Act of 1978 (ADA)*, 49 U.S.C. § 1305(a)(1), the scope of which the Court has previously had an opportunity to construe. *See, e.g., Morales v. Trans World Airlines, Incorporated*, 504 U.S. 374 (1992), where the Court held that the comparable language of the ADA "express[es] a broad preemptive purpose." *Id.* at 383.

B- THE PETITION SHOULD BE GRANTED TO ALLOW THE COURT AN OPPORTUNITY TO REDRESS THE MOTOR CARRIER INDUSTRY'S EXPOSURE TO RESTRICTIVE ECONOMIC REGULATION IMPOSED UNDER THE GUISE OF SAFETY WHICH IS CLEARLY LIKELY IF THE SECOND CIRCUIT'S DECISION IS PERMITTED TO STAND

In enacting the FAAA Act, Congress was both aware of and highly concerned that in preserving, under § 14501(c)(2)(A), the authority of a State to regulate motor carrier safety, albeit limited, such authority could be used by a State to continue or reimpose economic regulation and thereby defeat Congressional intent to promote open entry and competition within the motor carrier industry. Congress therefore admonished the States that it did "not intend the regulatory authority which the States may continue to exercise . . . to be used as a guise for continued economic regulation as it relates to prices, routes or services." H.R. Conf. Rep. No. 103-677, at 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756.

Petitioners contend that, in legislating the broad preemption of State, and local regulation of motor carrier prices, routes, and services, under § 14501(c)(1), and preserving only a limited authority in State and local governments to regulate the price of for-hire transportation when provided by tow truck without the prior consent or authorization of the owner or operator of the vehicle being towed (commonly referred to within the towing industry as *"non-consensual tows"*), under § 14501(c)(2)(C), Congress' clear intent was to remove the existing barriers to open and free competition among all motor carriers,

including those in the towing segment of the industry, to the maximum extent feasible. In doing so, Congress was aware that significant numbers of motor carriers, including many carriers operating in the towing segment of the industry in New York City and elsewhere, had pre-existing contracts to provide transportation services to members of the public, including towing services. As such, Congress was recognizing and seeking to further existing business relations among carriers and shippers as well as to create new ones, all under the broad umbrella of deregulation and competition.

While cloaked as a safety regulation intended to foreclose so-called "accident chasing" by towers rushing to the scene of accidents, the scope and application of the City's ordinance goes well beyond matters that relate solely to safety. Under the express terms of the City's ordinance, members of the public may never call upon their own tower to respond to the accident. Rather, the ordinance bars the freedom of choice which Congress intended for the public to enjoy, without regard to how much time may have lapsed since the accident occured or whether the disabled vehicle is impeding traffic. As such, the ordinance is applied in situations where public safety is no longer an issue. Instead operates solely and exclusively to the economic benefit of those companies which the City alone has permitted to serve and to the detriment of the consumer and his or her designated tower.

C- THE PETITION SHOULD BE GRANTED TO ALLOW THE COURT AN OPPORTUNITY TO DELIMIT THE EXTENT TO WHICH LOCAL AND STATE GOVERNMENTS MAY EXERCISE THE LIMITED AUTHORITY WHICH HAS BEEN RESERVED TO THEM WITHOUT DEPRIVING MOTOR CARRIERS OF THEIR PROPERTY RIGHTS

Petitioners further submit that, by deregulating the motor carrier industry and eliminating all barriers to marketplace entry, Congress created a property right in motor carriers, including towing motor carriers, manifested in the right to compete with other carriers in the community to the maximum extent possible. Thus, if the Congressional purpose of fostering competition is to be realized, the authority of any local or State government to exercise its police powers must, of necessity, be limited and its exercise by a State or local government narrow in its purpose and scope.

While Petitioners do not dispute that New York City may have a limited right to control the price of non-consensual towing, which might also include the right to select and dispatch tow trucks to respond to emergency situations, the City's purpose and the scope of its ordinance goes beyond this limited objective and arrogates to the City virtual total and unlimited control over all towing occurring following an accident, without regard to the accident's size or severity. Thus, in upholding New York City's ordinance, the Second Circuit's decision sanctions the exercise by a local government of regulatory authority well beyond what was envisioned by Congress, under § 14501(c)(2)(A) or § 14501(c)(2)(C). In so doing,

Petitioners have been deprived of their ability to continue providing services to their customers under existing contracts, or, in lieu of a contract, to openly compete for business as Congress intended would occur. As such, the Second Circuit's decision, permitting continued enforcement of New York City's towing ordinance, amounts to little more than a taking of the rights Congress conveyed to Petitioners under § 14501(c)(1).

CONCLUSION

Accordingly, Petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Argued September 1, 1998 Decided MAR 26 1999)

Docket Nos. 97-9499, 97-9551

(Filed Mar. 26, 1999)

ACE AUTO BODY & TOWING, LTD.; ATLAM TOWING SERVICE, INC.; BANGS TOWING, INC.; BEN'S TOWING SERVICE; BILLS TOWING SERVICE, INC.; BRAGG TOWING CO.; BROADWAY AUTO SERVICE, INC.; C&J COLLISION SERVICE, INC.; CHARLES SCHMIDT AND SONS, INC.; CHESTER'S HIGHWAY GARAGE OF PW, INC.; CK TOWING, INC.; DAVE'S HEAVY TOWING, INC.; DO-RITE RELIABLE TOWING, INC.; EFFICIENCY ENTERPRISE, INC.; EAST COAST INDUSTRIAL UNIFORM CORP.; F&B TRUCK REPAIR & MAINTENANCE, INC.; GALASSO TRUCKING, INC.; GESCO ICE CREAM VENDING CORP.; HENDRICKSON TOWING, INC.; KENNY'S FLEET MAINTENANCE, INC.; LEONARD AUTO BODY; MARJAM SUPPLY CO., INC.; MODEL TOWING & RECOVERY, INC.; MURRAY RUDE SERVICES, INC.; PARKVIEW TOWING CORP.; PLAZA AMBULETTE SERVICE, INC.; RAPID ARMORED CORPORATION; SUNNY DAY ENTERPRISE INDUSTRIES, LTD.; TOMMY BUG AUTO REPAIRS, INC.; ULTIMATE TRANSPORT, INC.; ZANT PRE INC., doing business as presant glass,

Plaintiffs-Appellants-Cross-Appellees,

v.

THE CITY OF NEW YORK,

Defendant-Appellee-Cross-Appellant.

Before:

NEWMAN, CARDAMONE, and PARKER,
Circuit Judges

Plaintiffs appeal and the City of New York cross-appeals from a judgment entered on October 30, 1997 in the United States District Court for the Southern District of New York (Cote, J.), holding that 49 U.S.C. § 14501(c) does not preempt certain City laws regulating the municipal towing industry, except to the extent conceded by the City, and that preemption of municipal towing regulations under 49 U.S.C. § 14501(c) does not exceed Congress' commerce clause authority.

Affirmed.

BRUCE J. ROBBINS, Eastchester, New York, *for Plaintiffs-Appellants-Cross-Appellees.*

MORDECAI NEWMAN, New York, New York (Jeffrey D. Friedlander, Acting Corporation Counsel of the City of New York, Larry A. Sonnenshein, Robin Binder, New York, New York, of counsel), *for Defendant-Appellee-Cross-Appellant.*

CARDAMONE, *Circuit Judge*:

Looming over our Republican form of government, where each state in the exercise of sovereignty enacts its own laws, lies the Supremacy Clause of the U.S. Constitution, from which clause has been derived a legal concept

known – to judges and lawyers, if not to laypersons – as preemption. Preemption, the doctrine by which federal law supplants contrary state and local law, is the subject of this appeal. Plaintiffs, who are members and affiliates of the regional and New York City tow truck industry, filed an action against the defendant City in the United States District Court for the Southern District of New York (Denise Cote, Judge) challenging a City ordinance aimed at eliminating the practice of "chasing" – where tow trucks race one another to an accident scene in competition for business – on the grounds that the regulation of intrastate towing is a field explicitly preempted by federal law. The challenge was turned down.

This appeal requires us to determine the extent to which a federal statute, 49 U.S.C. § 14501(c), preempts New York City laws regulating the municipal tow truck industry and, in addition, on the City's cross-appeal, to determine whether such preemption is beyond Congress' authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

BACKGROUND

A. The New York City Towing Laws

New York City laws governing municipal towing are codified in the City Administrative Code (Admin. Code), Title 20, Chapter 2, Subchapter 31, §§ 20-495 to -528 (1996). The implementing regulations, promulgated by the New York City Department of Consumer Affairs (Department), are found in the Rules of the City of New York (RCNY), Title 6, Chapter 2, Subchapter EE, §§ 2-361 to -376 (1995). Because these laws are voluminous and

were examined in detail by the district court, *see Ace Auto Body & Towing, Ltd. v. City of New York*, No. 96 Civ. 6547 (DLC), 1997 WL 669891, at *1-*4 (S.D.N.Y. Oct. 28, 1997) (*Ace*), we limit our discussion to those aspects most pertinent to this appeal.

1. General Towing Requirements

The City towing laws require tow truck businesses and operators employed by them to be licensed to engage in towing by the Department. *See* Admin. Code § 20-496. To qualify for a license, a towing company must maintain liability insurance, post a surety bond or cash alternative, and demonstrate that its principals have no relevant criminal history. *See* Admin. Code §§ 20-498(a), -499, -500; 6 RCNY §§ 2-362, -375. License requirements for operators include a minimum age of 18 years, possession of an appropriate driver's license, and lack of traffic or criminal convictions. *See* Admin. Code § 20-498; 6 RCNY § 2-364. Additional rules govern the mechanical safety of tow trucks, the information displayed on trucks, reporting, and recordkeeping. *See* Admin. Code §§ 20-501, -503, -507; 6 RCNY §§ 2-363, -365.

2. DARP and SARD Accident Management Programs

Under its towing laws, the City has established two management programs applicable to vehicles disabled by accidents and weighing less than 15,000 pounds: the Directed Accident Response Program (DARP), *see* Admin.

Code § 20-518; and the Special Accident Response Districts Program (SARD), *see id.* § 20-518.1. The legislative history informs us, and plaintiffs concede, that both programs were adopted to eliminate the practice of "chasing," in which tow truck operators monitor police radio transmissions to learn of vehicular accidents and then race each other, often recklessly, to accident scenes to earn fees from the resultant towing and ancillary repair work.

Under DARP, the Department has divided New York City into zones, and it maintains a list of qualified towing companies in each zone. *See id.* § 20-518(a)(2). As accidents occur within a given zone, the Police Department summons an approved towing company to the accident scenes on a rotating basis. The number of qualified companies per zone is not limited. However, it is important to note that a disabled vehicle to which DARP applies must be removed by an approved tower summoned by the police; it cannot be removed by a tower called independently by the operator of the disabled vehicle. *See id.* § 20-518(b)(1).

Under SARD, enacted to supplement DARP, the Department has designated certain City areas as districts and then subdivided each district into zones. One towing company per zone has exclusive responsibility for removing all vehicles in that zone for a specified period of time; other companies are not permitted to tow, even when called by the motorists involved. *See id.* § 20-518.1(a)(1), (c)(1). The maximum number of companies allowed to tow within a SARD zone is three, and if more than three

meet certain initial requirements, then the three authorized are chosen by lottery. *See id.* § 20-518.1(a)(1), (b)(2); 6 RCNY § 2-371.1(d).

DARP and SARD participants are, in addition, required to maintain their own storage and repair facilities. *See* Admin. Code § 20-518(b)(3) (DARP); 6 RCNY § 2-371(h)-(n) (DARP); Admin. Code § 20-518.1(b)(1)(h) (SARD); 6 RCNY § 2-371.1(e)-(i) (SARD).

3. Rotation Tow Program

The City towing laws also establish the Rotation Tow Program (ROTOW). As its name suggests, ROTOW (like DARP) authorizes companies to tow vehicles on a rotating basis; however, ROTOW applies only to motor vehicles "suspected of having been stolen or abandoned," as well as to certain other unattended vehicles. *See* Admin. Code § 20-519(a)(1). ROTOW companies must meet criteria ensuring their ability to remove vehicles promptly, *see* 6 RCNY § 2-372(e)-(h), and they must maintain storage facilities that meet specified requirements, *see id.* § 2-372(i).

4. Towing Rates

The towing laws also prescribe maximum rates for towing and storage of all vehicles, whether or not the tow in question is governed by DARP or SARD. *See* Admin. Code § 20-509; 6 RCNY § 2-368. Flat rates for towing and storage are specified for vehicles towed under ROTOW. *See* Admin. Code § 20-519(c)(1).

B. The Federal Law: 49 U.S.C. § 14501(c)

It is in this context of municipal governance that plaintiffs allege that the New York City towing laws are preempted by 49 U.S.C. § 14501(c). That statute declares a state or municipality "may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1) (1994 & Supp. I 1995) (codifying the FAA Authorization Act of 1994, Pub.L. No. 103-305, § 601(c), 108 Stat. 1569, 1606, as amended by the ICC Termination Act of 1995, Pub.L. No. 104-88, § 103, 109 Stat. 803, 899).

At the same time, subdivision (2) of § 14501(c), entitled "Matters Not Covered," exempts various categories of motor carrier regulation from preemption, two of which are relevant in the case at hand. First, the prohibition on state and local regulation does not

> restrict the safety regulatory authority of a State with respect to motor vehicles . . . or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

Id. § 14501(c)(2)(A). Second, this prohibition

> does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law . . . relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

Id. § 14501(c)(2)(C).

C. The District Court's Decision

Believing, as noted, that § 14501(c) preempted the City's towing laws, plaintiffs sued the City on August 28, 1996 seeking declaratory and injunctive relief against enforcement of those laws. On October 27, 1997 Judge Cote issued an opinion and order granting in part and denying in part the parties' cross-motions for summary judgment, and judgment was entered three days later. *See Ace*, 1997 WL 669891.

In ruling on the parties' cross-motions for summary judgment, the district court held that the towing laws largely withstood plaintiffs' preemption challenge. *See id.* at *7-*11. It reasoned that although § 14501(c)(1) generally preempted intrastate *regulation* of vehicular towing, the safety and financial responsibility exceptions under § 14501(c)(2)(A) were sufficiently broad to exempt the City towing laws from preemption with respect to the SARD, DARP, and ROTOW programs as well as the licensing and eligibility requirements. *See id.*

At the same time the district court ruled that City laws regulating *rates* for *nonconsensual* tows were saved from preemption by § 14501(c)(2)(C), it also ruled that the laws pertaining to *consensual* tow rates were preempted. *See id.* at *11. Further, Judge Cote declined to find that preemption of the nonconsensual tow rate regulations exceeded Congress' Commerce Clause power. *See id.* at *11-*12. From this October 1997 judgment plaintiffs appeal, and the City of New York cross-appeals. We affirm the result reached in the district court, although for somewhat different reasons.

DISCUSSION

I Standard of Review

On appeal, a grant of summary judgment is reviewed de novo to determine whether the parties' submissions "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir. 1991) (discussing summary judgment standard). Because in the present litigation all parties concede the lack of a genuine factual dispute, the only inquiry is which party is entitled to judgment as a matter of law.

II Preemption

The Supremacy Clause of the U.S. Constitution declares that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. As a consequence, state and local laws are preempted where they conflict with the dictates of federal law, and must yield to those dictates. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11, 6 L.Ed. 23 (1824); *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 88 (2d Cir. 1998). Preemption " 'may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' " *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990)).

Where, as with 49 U.S.C. § 14501(c), a federal statute expressly preempts state or local law, "analysis of the scope of the pre-emption statute must begin with its text." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). And, we must also " 'start with the assumption that the historic police powers of the States [are] not to be superseded . . . unless that was the clear and manifest purpose of Congress.' " *Id.* at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). As such, Congress' purpose is the "ultimate touchstone" of preemption analysis. *Id.* (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

A. Preemption Under 49 U.S.C. § 14501(c)(1)

The parties before us do not disagree that § 14501(c)(1) generally preempts state and local regulation of the intrastate towing industry. *See Harris County Wrecker Owners for Equal Opportunity v. City of Houston*, 943 F.Supp. 711, 722 (S.D. Tex. 1996); H. R. Rep. No. 104-311, at 119 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 831 (explaining that the 1995 amendments, which added subsection (c)(2)(C) exempting nonconsensual tow rates from preemption, were "not intended to permit re-regulation of any other aspect of tow truck operations").

The City asserts that, in this context, § 14501(c)(1) does not preempt its regulation of storage and repair facilities because the term "transportation" as used in that subsection includes neither storage nor repair. On this point, the City refers to *Rhode Island Pub. Towing Ass'n v. Rhode Island*, Civ. No. 96-454ML, 1997 WL 135571 (D.R.I. Feb. 28, 1997), which relied upon a definition

obtained from *Black's Law Dictionary* 1344 (5th ed. 1979), that defines the word "transportation" as encompassing the "movement of goods or persons from one place to another, by a carrier." *Rhode Island Pub. Towing Ass'n*, 1997 WL 135571, at *5. This definition is, of course, accurate as far as it goes, but it ignores the broader statutory definition that Congress intended to apply to § 14501:

> The term "transportation" includes –
>
> (A) a motor vehicle . . . or equipment . . . related to the movement of passengers or property, or both . . . ; and
>
> (B) services related to that movement, including . . . storage, handling, packing, unpacking, and interchange of passengers and property.

49 U.S.C. § 13102(19) (1994 & Supp.1995). Because the statutory definition explicitly broadens "transportation" to include storage, and because services related to the movement of passengers or property easily include repair, we decline to adopt the City's narrow construction of the term "transportation."

B. Exemption from Preemption Under § 14501(c)(2)

The principal question raised by plaintiffs is the extent to which the New York City towing laws are saved from preemption by language in § 14501(c)(2)(A), which preserves the "safety regulatory authority of a State with respect to motor vehicles" as well as the "authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements." *Id.* § 14501(c)(2)(A). Specifically, plaintiffs

contend that the City towing laws are so sweeping in their restrictive effects as to bar many companies from entering the municipal towing market. For this reason, they urge us to find that the towing laws constitute *de facto* economic regulation, contrary to the congressional aim of § 14501(c)(1) to deregulate, and that therefore the towing laws should not be ruled exempt from preemption. The City, for its part, concedes the preemption of those laws setting maximum rates for consensual towing, but insists that its laws otherwise fall entirely within the safety and financial responsibility exemptions from preemption.

Hence, the precise issue before us is whether the City towing laws are properly characterized under § 14501(c) as safety and financial responsibility regulations or as economic regulations. In addressing this issue, we find it helpful first to examine the text and history of the statute in order to ascertain Congress' purpose, which, as noted, is the gauge by which preemption analysis is measured.

1. Congressional Purpose

Statutory History. Section 14501(c) was originally enacted and codified at 49 U.S.C. § 11501(h), without the present exemption for regulation of nonconsensual tow rates, by the Federal Aviation Administration Authorization Act of 1994 (FAA Authorization Act), Pub. L. No. 103-305, § 601(c), 108 Stat. 1569, 1606. As such, § 11501(h)(1) preempted state and local regulation of any "price, route, or service of any motor carrier . . . with respect to the transportation of property," and

§ 11501(h)(2)(A) exempted state and local authority with respect to safety and financial responsibility regulations.

The House Conference Report that accompanied the legislation indicates that the purpose behind § 11501(h)(1) was to free the motor carrier industry from state and local regulation and to put that industry on a playing field level with that of the air carrier industry, which had already been deregulated by the Airline Deregulation Act of 1978. *See* H.R. Conf. Rep. No. 103-677, at 85, 87 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757, 1759. In so doing, Congress hoped to eliminate the competitive advantage air carriers, such as Federal Express, had enjoyed under decisions interpreting the 1978 statute, relative to motor carriers, like United Parcel Service. *See id.* (citing *Federal Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991)).

The House Conference Report further clarifies that the exemptions from preemption under § 11501(h)(2)(A) simply reflect the fact "that State authority to regulate safety, financial fitness and insurance . . . of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected." *Id.* at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757; *see also id.* at 84, *reprinted in* 1994 U.S.C.C.A.N. at 1756 ("[N]othing in these new subsections contains a new grant of Federal authority to a State. . . . The intention of the conferees is solely to identify certain areas that are not preempted. . . . "). The Report nonetheless explicitly qualifies these exemptions, stating, "[t]he conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority." *Id.*

Just one year after its enactment, § 11501(h) was recodified at 49 U.S.C. § 14501(c) – with an added exemption for state regulation of nonconsensual tow rates – by the Interstate Commerce Commission Termination Act of 1995 (ICC Termination Act), Pub. L. No. 104-88, § 103, 109 Stat. 803, 899. The House Report that accompanied the legislation notes that the added provision "struck a balance between the need to protect consumers from exorbitant towing fees and the need for a free market in towing services." H.R.Rep. No. 104-311, at 120, *reprinted in* 1995 U.S.C.C.A.N. at 793, 832. Accordingly, the provision was "not intended to permit re-regulation of any other aspect of tow truck operations." *Id.* at 119, *reprinted in* 1995 U.S.C.C.A.N. at 831.

Statutory Text. In its current incarnation, 49 U.S.C. § 14501(c)(1) continues to preempt any state or local law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." Although we have not previously had an opportunity to construe this provision of the law, we are not entirely without guidance in this endeavor. *See Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187-89 (9th Cir. 1998) (interpreting the "related to" language of § 14501(c)(1) by reference to similar language in other statutes); *Deerskin Trading Post, Inc. v. United Parcel Serv., Inc.*, 972 F.Supp. 665, 667-72 (N.D. Ga. 1997) (same).

The House Conference Report to the FAA Authorization Act explains that § 14501(c) was "intended to function in the exact same manner with respect to its preemptive effects" as 49 U.S.C. § 41713(b)(4), which contains similar "related to" language. H.R. Conf. Rep.

No. 103-677, at 85, *reprinted in* 1994 U.S.C.C.A.N. at 1757. The Supreme Court, in turn, has twice interpreted the predecessor of 49 U.S.C. § 41713(b)(4) by reference to similar "relate to" language in the Employee Retirement Income Security Act of 1974 (ERISA), as codified at 29 U.S.C. § 1144(a). *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223-24 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. at 383-84; *see also* H.R. Conf. Rep. No. 103-677, at 83, *reprinted in* 1994 U.S.C.C.A.N. at 1755 (explaining that the 1994 revision and recodification of the predecessor to 49 U.S.C. § 41713 were not intended to alter the construction given in *Morales*).

Recently we had occasion to explain that interpretation of the "relate to" language of ERISA ultimately "should be guided by common sense." *Plumbing Indus. Bd., Plumbing Local Union No. 1 v. E.W. Howell Co.*, 126 F.3d 61, 67 (2d Cir. 1997). There, we elaborated:

> [T]he Supreme Court has instructed that analysis under ERISA's preemption clause must begin with the starting presumption that Congress does not intend to supplant state law, and [has] admonished courts applying the preemption clause to look . . . to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive. . . . Hence, to overcome the anti-preemption presumption, a party challenging a statute must convince a court that there is something in the practical operation of the challenged statute to indicate that it is the type of law that Congress specifically aimed to have ERISA supersede.

Id. at 66-67. In the context of the quoted case, we ruled that a state law that "refer[red] to" or had "a clear connection with" an ERISA plan would suffer preemption under the "relate to" language. *Id.* at 67. At the same time, we also found the presumption against preemption – because Congress does not aim to supplant state law – would not be overcome where the effects of state law on ERISA plans were only incidental and not coercive. *See id.* (citing *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 816 & n. 16 (1997)).

Guided by this precedent, we adopt a similar approach to § 14501(c) and its application to the New York City towing laws. On the one hand, as discussed earlier, the broad "related to" language of § 14501(c)(1) generally preempts economic regulation by the states within the field of intrastate towing. On the other hand, the statutory text, Congress' aim to leave the states' residual control over safety and other local concerns intact, and the presumption against preemption of historic state police power, argue against finding preemption where only incidental economic burdens can be discerned. In the present circumstances, where these competing concerns collide, we are persuaded, for reasons we will explain in a moment, that the starting presumption against preemption of state law has not been overcome.

2. Application to the New York City Towing Laws

The DARP, SARD, and ROTOW Programs

At first blush, the purposes of the DARP, SARD, and ROTOW programs appear to be safety and not economic in nature. Plaintiffs do not dispute that the DARP and SARD programs were enacted to combat the practice of "chasing" described earlier. In a similar safety vein, as the district court noted, the ROTOW program is aimed at "removing abandoned and stolen vehicles that may (for example) present hazards to other motorists or opportunities for misuse to criminals or children." *Ace*, 1997 WL 669891, at *7.

An examination of the basic structure of these towing programs confirms this initial impression. The rotational system they employ attempts to curtail the competitive incentives that motivate the practice of chasing. Quite simply, requiring towers to service disabled vehicles on a rotating basis eliminates other towers from competing for fees. Further, neither DARP nor ROTOW limit the number of participants in the program or bar towing companies based outside the City from participating. Although the zoning system adopted by SARD limits the number of participants per zone, its legislative history reveals the program was adopted because DARP failed to eliminate chasing in several City precincts. Hence, it is difficult to treat these programs as a guise for economic regulation. As a consequence, the City of New York's rotational towing programs are sufficiently safety-oriented to survive preemption under § 14501(c). *See Harris County Wrecker Owners for Equal Opportunity v. City of*

Houston, 943 F.Supp. at 732 (supporting this reading of rotational towing programs).

Plaintiffs aver that the safety exemption of § 14501(c)(2)(A) does not permit such a broad construction. Specifically, they insist that the exemption extends only to safety regulation of the mechanical components of motor vehicles, *e.g.*, windshield wipers and brakes, and not to municipal management of vehicular accidents. In support of this view, they point out that § 14501(c)(2)(A) exempts only "the safety regulatory authority of a State with respect to motor vehicles" and not with respect to "motor carriers," a term used elsewhere by the statute to denote persons "providing motor vehicle transportation for compensation," 49 U.S.C. § 13102(12) (1994 & Supp.1995).

Neither the text nor the legislative history of § 14501(c)(2)(A) supports such a narrow reading, as the district court correctly observed. *See Ace*, 1997 WL 669891, at *8-*9. To the extent that the text's usage of the term "motor vehicles" creates an ambiguity, this ambiguity does not exclude the possibility of interpreting the phrase "safety regulatory authority . . . with respect to motor vehicles" to encompass the authority to enact safety regulations with respect to motor vehicle accidents and breakdowns. Construing the text in this fashion fully comports with Congress' purpose to leave intact state and local safety regulatory authority under 49 U.S.C. § 14501(c).

In addition, to the extent that our reading of the safety exemption may touch upon delicate matters of public policy, this view carefully tracks the interpretation given by the U.S. Department of Transportation. *See* U.S.

Dep't of Transp., Intrastate Trucking Deregulation: An Analysis and Interpretation of Title VI, Federal Aviation Administration Authorization Act of 1994, P.L. 103-305 (Mar. 1995) (Intrastate Trucking Deregulation) ("[W]e believe that State or local regulations governing the towing of damaged or abandoned vehicles that are public safety hazards would fall within this exemption, assuming again that such regulations are not a guise for broader economic restrictions."). Even were the City's regulations to impose incidental economic constraints on free market competition, the presumption against preemption of state police authority, *see Medtronic*, 518 U.S. at 485, tips the balance decidedly in the City's favor.[1]

C. Eleventh Circuit's Contrary View

In holding that 49 U.S.C. § 14501(c)(2)(A) preserves the New York City towing laws, we part from *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F.3d 538 (11th Cir.

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[1] Plaintiffs also challenge the district court's application of the rational basis standard of review in its analysis of the DARP and SARD programs. *See Ace*, 1997 WL 669891, at *7 & n. 7. To the extent that the district court relied on our decision in *Beatie v. City of New York*, 123 F.3d 707 (2d Cir. 1997), that decision addressed a Fourteenth Amendment question, not a preemption question, and therefore is inapposite. To the extent that the district court may have applied the *Beatie* standard without giving due consideration to Congress' purpose in enacting 49 U.S.C. § 14501(c), this application was erroneous. However, our agreement with the ultimate result of the district court's analysis renders it unnecessary to address this point further.

1998). There, the Eleventh Circuit held that safety regulations enacted by the City of Atlanta to govern its municipal towing industry were not exempt from preemption for the reason that § 14501(c)(2)(A) exempts only state regulatory authority and not local or municipal regulatory authority. *Id.* at 545-48.

In reaching this conclusion, Mayer relied largely on two arguments. First, the Eleventh Circuit reasoned that the term "State" as used in § 14501 is defined to include only the 50 states and the District of Columbia, *see* 49 U.S.C. § 13102(18) (1994 & Supp. I 1995), and that the text of subsection (c)(2)(A) preserves only the "authority of a State," whereas all other provisions within § 14501 explicitly refer to political subdivisions of the state. *See* 158 F.3d at 545. Second, that court thought that disallowing towing regulation at the local level furthers Congress' purpose to deregulate the intrastate motor carrier industry, insofar as its reading of § 14501 would eliminate the patchwork of safety regulations enacted by localities within each state. *See id.* at 546.

We think these arguments do not carry the day in our case. Granted, the text of § 14501(c)(2)(A), unlike other subsections of § 14501, fails to preserve explicitly the regulatory authority of the political subdivisions of the state. But we see no reason to construe this language to prevent the state from delegating *its* regulatory authority to a municipality. To the contrary, the legislative history indicates that state safety regulatory authority (including, presumably, the authority to delegate) was to be "unaffected" by the preemption statute. *See* H.R. Conf. Rep. No. 103-677, at 84, 85, *reprinted in* 1994 U.S.C.C.A.N. at 1756, 1757; *AJ's Wrecker Serv., Inc. v. City of Dallas*, Nos.

97-1311D, 97-2398D, 1998 WL 185521, at *3 (N.D. Tex. April 15, 1998); *Harris County Wrecker Owners*, 943 F.Supp. at 726-27; *see also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607-09, 611-12 (1991) (noting that although FIFRA expressly permits only "States" to regulate pesticides, the most "plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities"); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 54-55 (2d Cir. 1988) (holding that usage of the term "state" in OSHA preemption provision also encompassed municipalities). *But see CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 628-29 (6th Cir. 1996) (holding that usage of the term "State" in FRSA exemption provision did not encompass municipalities). Here, authority for the New York City towing laws rests on precisely this sort of delegation from the State of New York. *See* N.Y. Veh. & Traf. Law § 1642(a)(15) (McKinney 1996) (delegating towing regulatory authority to cities of population over one million).

Further, although the legislative history clearly illustrates Congress' deregulatory purpose, the history is ambiguous as to the scope of that purpose. More particularly, the reports issued in connection with § 14501 suggest that its primary purpose was to eliminate local economic regulation, not local safety regulation. *See* H.R. Conf. Rep. No. 103-677, at 86-87, *reprinted in* 1994 U.S.C.C.A.N. at 1758-59. To the extent that the scope of Congress' purpose is unclear, we hesitate to construe the text of § 14501 so as to frustrate unnecessarily the ability

of municipalities to respond to the local safety concerns created by local towing industries. Such hesitance, furthermore, is consistent with the presumption against preemption of state and local regulations enacted under their historic police powers. *See Medtronic*, 518 U.S. at 485.

Moreover, the U.S. Department of Transportation has clarified its view that § 14501(c)(2)(A) exempts both "State [and] local regulations" from preemption. U.S. Dep't of Transp., Intrastate Trucking Deregulation. Admittedly, we are not bound to accept this view of § 14501(c)(2)(A). *Compare Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984) (holding that where the text of a statute is ambiguous, courts must defer to any permissible interpretation given by the agency charged with its administration), with 49 U.S.C. § 13506(b)(1), (3) (1994 & Supp. I 1995) (Secretary of Transportation lacks jurisdiction over municipal transportation and emergency towing). But, to the extent that our reading of § 14501 may implicate questions of expertise in the field of motor carrier regulation, the Department's statement suggests that our reading is consistent with sound public policy.

As a consequence, we decline to follow *Mayer*, 158 F.3d 538, and hold instead that 49 U.S.C. § 14501(c)(2)(A) does not limit the authority of a state to delegate its towing regulatory authority to local or municipal governments.

D. Licensing and Eligibility Requirements

In addition to challenging the DARP, SARD, and ROTOW programs generally, plaintiffs also challenge the

City's specific requirements regarding licensing, display of information, reporting, recordkeeping, criminal history, insurance, posting of bond, and maintenance of storage and repair facilities. Most of these requirements are so directly related to safety or financial responsibility and impose so peripheral and incidental an economic burden that no detailed analysis is necessary to conclude that they fall within the § 14501(c)(2)(A) exemptions. Although the bonding requirement does present the potential for abuse, the record reflects that the actual economic burdens are minimal. *See* Roberto Velez Decl. 4 (explaining that towing businesses must either post $5,000 bond or contribute $200 to trust fund); *see also* Admin. Code § 20-499 (contribution to fund satisfies bond requirement).

The storage and repair requirements concededly present a more difficult question. Plaintiffs' attack on this issue appears to focus not on the City's regulation of vehicle storage and repair *per se*, but rather on the City's requirement that eligible towing companies maintain their own storage and repair facilities. In plaintiffs' view, these facilities requirements impose substantial barriers to market entry by new businesses insofar as they increase the cost of qualifying to participate in the City's exclusive towing programs. Plaintiffs observe, in addition, that many of the safety goals cited by the district court in support of these requirements, e.g., reducing the number of hazardous tows of damaged vehicles from one site to another, *see Ace*, 1997 WL 669891, at *10, could be met by a scheme that would impose a lesser economic burden on competition in the towing industry. The City

could, for example, allow towing companies to subcontract with other facilities for storage and repair services, but still meet its safety goals by regulating the subcontracting of storage and repair.

Plaintiffs' hypothesis of a less restrictive regulatory scheme does carry a certain appeal, in light of the substantial economic burdens imposed by the City's storage and repair regulations. But preemption analysis does not insist upon a least restrictive means test. For these regulations to escape federal preemption, it is enough, in light of the text and history of § 14501(c), that the storage and repair provisions are reasonably related to the safety aspects of towing disabled vehicles and that the economic burdens thereby imposed are only incidental. Above and beyond the need to eliminate chasing, a disabled motor vehicle clearly presents a safety hazard in a municipality where vehicular traffic is so heavy, and the City has an obligation to make arrangements for its removal from the road and to place it in safe-keeping. And, because the economic burdens on interstate commerce are only incidental, the presumption against preemption of a state's police power to effect that removal supports preserving the City's storage and repair regulations. *See Plumbing Indus. Bd.*, 126 F.3d at 67 (incidental burdens insufficient to overcome presumption against preemption where ERISA statute used similar "relate to" language).

E. Towing Rates

As stated, the City concedes its regulations governing rates for *consensual* tows are preempted, in light of the language of § 14501(c)(2)(C) exempting such regulations

from preemption only when they apply to *nonconsensual* tows. For their part, plaintiffs do not dispute that § 14501(c)(2)(C) generally exempts nonconsensual tow rate regulations. Rather, plaintiffs argue that Congress intended the provision to apply to tows that are nonconsensual solely by virtue of the owner's or driver's physical incapacity at the accident scene, and not to tows that are nonconsensual solely because the City's rotational system dictates the tower be summoned to the scene by the Police Department.

In support of this view, the sole evidence offered by plaintiffs is the following statement, taken from the Congressional Record:

> Nonconsensual towing situations are those where the owner of the vehicle is unable to consent to it being towed, such as in cases of a severe accident, where the vehicle is towed from a commercial establishment for being illegally parked, or towed from city streets as a result of police order.

141 Cong. Rec. H15600-02 (daily ed. Dec. 22, 1995) (statement of Rep. Rahall). This statement, we think, is at best ambiguous. There is no indication either that the list of examples of nonconsensual tows was meant to be exclusive, or that the phrase "unable to consent" should otherwise be construed in so restricted a fashion.

More to the point, the plain language of § 14501(c)(2)(C) clearly encompasses any tow "performed without the prior consent or authorization of the owner or operator of the motor vehicle," regardless of the reason for the lack of consent. *See also* H.R. Conf. Rep. No. 104-422, at 219 (1994), *reprinted in* 1995 U.S.C.C.A.N. 850,

904 ("Non-consent tows occur when vehicle owners/operators are unable to give their voluntary consent to the tow. Non-consent tows *typically* occur in emergency situations and when tows are made from private property.") (emphasis added). Consequently, we decline to adopt the restricted statutory construction advanced by plaintiffs.

III Commerce Clause

Finally, the City declares that insofar as 49 U.S.C. § 14501(c) preempts its consensual tow rate regulations, it exceeds Congress' authority to regulate activities substantially affecting interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3 (Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 558-63 (1995) (defining scope of commerce clause authority). The City concedes in its brief on this appeal that, in enacting the predecessor to § 14501(c), "Congress made the express finding that state regulation of intrastate motor carrier[s] substantially affects interstate commerce." *See* FAA Authorization Act, § 601(a), 108 Stat. at 1605 (congressional findings); H.R. Conf. Rep. No. 103-677, at 87-88, *reprinted in* 1994 U.S.C.C.A.N. at 1759-60 (same). But the City still insists that Congress failed to make the requisite findings specifically with respect to state regulation of intrastate towing, which it believes tends to be localized in its effects on commerce as compared with state regulation of intrastate motor carriers, the effect of which impacts a wider area.

In framing this argument, the City relies primarily on the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995). There the Court held that the commerce

clause power extends to regulation, first, of "the use of the channels of interstate commerce"; second, of "the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and third, of "those activities that substantially affect interstate commerce." *Id.* at 558-59. In determining whether a given activity "substantially affects" interstate commerce, the Court looked to the economic nature of the activity, its effects as viewed in the aggregate, other discernible ties to commerce, and congressional findings with respect to effects on commerce. *See id.* at 559-63.

Lopez clarified that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Id.* at 562. Rather, such findings play a key role only where "no . . . substantial effect [is] visible to the naked eye." *Id.* at 563. In the present case, the effects on interstate commerce are far from invisible. At least one affidavit submitted by plaintiffs, for instance, attests to the effects of the New York City towing laws on towing companies based in other states. *See* David Bender Aff. ¶ 4 ("Because of our New Jersey geographic location, and our interstate operation, we frequently have to operate through New York City."). Given that many cities are situated in close proximity to nearby states, *e.g.*, Chicago, Philadelphia, Kansas City, and Washington, D.C., it is reasonable to infer that municipal towing laws have, in the aggregate, a substantial effect on interstate commerce. We, of course, defer to the legislative will where any rational basis may be discerned for finding a substantial effect on interstate commerce from a given activity. *See Preseault v. ICC*, 494 U.S. 1, 17 (1990); *see also Lopez*, 514 U.S. at 557 (noting that

rational basis standard applies); *Proyect v. United States*, 101 F.3d 11, 12-13 (2d Cir. 1996) (per curiam) (same).

But even were this visible effect on commerce seen as something less than "substantial," *see Lopez*, 514 U.S. at 559 (effect must be substantial), we think, as did the district court, that Congress' findings regarding state regulation of intrastate motor carriers provide a rational basis for preempting state regulation of intrastate towers as well. As the Supreme Court noted, " 'where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.' " 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n. 27 (1968)) (emphasis removed). Since here the City similarly alleges that only a small subset of the activity encompassed by § 14501(c) has a *de minimis* effect on interstate commerce, Congress had a rational basis for regulating that subset within the context of its more general statutory scheme. *See United States v. McKinney*, 98 F.3d 974, 980 (7th Cir. 1996) ("The same findings that authorize the federal government to regulate all commerce in controlled substances support its authority to regulate a subset of commerce in controlled substances," *i.e.*, the selling of narcotics in school zones.), *cert. denied*, 520 U.S. 1110 (1997).

CONCLUSION

Accordingly, and for the reasons stated, we hold that 49 U.S.C. § 14501(c) does not preempt the New York City towing laws, except to the extent conceded by the City.

We further hold that preemption of state and local regulation of intrastate towing under 49 U.S.C. § 14501(c) does not exceed Congress' authority to legislate pursuant to the Commerce Clause. The judgment of the district court is therefore affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ACE AUTO BODY & TOWING, LTD.; ATLAM TOWING SERVICE, INC.; BANGS TOWING, INC.; BEN'S TOWING SERVICE; BILL'S TOWING SERVICE; BRAGG TOWING CO.; BROADWAY AUTO SERVICE, INC.; C&J COLLISION SERVICE, INC.; CHARLES SCHMIDT AND SONS, INC.; CHESTER'S HIGHWAY GARAGE OF PW, INC.; CK TOWING, INC.; DAVE'S HEAVY TOWING, INC.; DO-RITE RELIABLE TOWING, INC.; EFFICIENCY ENTERPRISE, INC.; EAST COAST INDUSTRIAL UNIFORM CORP.; EASTERN UNIFORM SERVICE CORP.; F&B TRUCK REPAIR & MAINTENANCE, INC.; GALASSO TRUCKING, INC.; GESCO ICE CREAM VENDING, CORP.; HENDRICKSON TOWING, INC.; KENNY'S FLEET MAINTENANCE, INC.; LEONARD AUTOBODY; MARJAM SUPPLY CO., INC.; MODEL TOWING & RECOVERY, INC.; MURRAY RUDE SERVICES, INC.;, PARKVIEW TOWING CORP.; PLAZA AMBULETTE SERVICE, INC.; RAPID ARMORED CORPORATION; SUNNY DAY ENTERPRISE INDUSTRIES, LTD.; TOMMY BUG AUTO REPAIRS, INC.; ULTIMATE TRANSPORT, INC.; and ZANT PRE, INC., d/b/a Presant Glass, Plaintiffs, -v- THE CITY OF NEW YORK, Defendant.	96 CIV. 6547 (DLC) *OPINION AND ORDER*

APPEARANCES:

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DENISE COTE, District Judge:

Before the Court are motions for summary judgment filed simultaneously by both plaintiffs and defendant. For the reasons stated below, the Court grants in part and denies in part both motions.

PROCEDURAL BACKGROUND

Plaintiffs are a group of tow truck owners and operators, auto-body repair shops, and trucking companies that regularly contract with tow truck companies. Plaintiffs commenced this action against the City of New York ("City") on August 28, 1996, seeking (1) a declaration that certain City laws regulating the municipal tow truck industry are preempted by federal law, specifically, the Federal Aviation Administration Authorization ("FAAA") Act of 1994, codified in pertinent part at 49 U.S.C. § 14501(c), as amended by the Interstate Commerce Commission ("ICC") Termination Act of 1995; and (2) a permanent injunction prohibiting further enforcement of

those challenged regulations. On October 31, 1996, plaintiffs applied for a temporary restraining order ("TRO"), but the Court declined to issue the TRO because relevant provisions of the City's law were not in effect at the time. Upon formal enactment of the law, plaintiffs applied again for a TRO, on November 14, 1996, and the Court again denied the application.

Plaintiffs subsequently moved for, and the City opposed, entry of a preliminary injunction; the parties introduced all relevant evidence in their written submissions to the Court based on their agreement that a hearing was unnecessary. Although the Complaint sought a declaration and injunction as to substantially all of the City's tow truck regulatory scheme, plaintiffs specifically limited their motion for a preliminary injunction to discrete aspects of the regulations governing the towing of vehicles disabled in the context of accidents. In a Memorandum Opinion and Order ("Order") dated April 25, 1997, the Court denied plaintiffs' motion on the ground that, even if plaintiffs could show irreparable harm – which was doubtful – they could not demonstrate a likelihood of success on the merits. *Relying on Harris County Wrecker Owners v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996), the Court concluded that while it appeared that Congress had preempted local towing regulations through Section 14501(c) of the Act, it was "likely that the challenged regulations f[e]ll within the safety regulation exception of Section 14501(c)(2)(A)," and were therefore exempt from preemption. Order at 6.

Both plaintiffs and the City thereafter moved for summary judgment. The Court heard oral argument on the motions on August 7, 1997, and reserved decision.

FACTS

All of the pertinent facts in this case are undisputed, leaving the Court to address solely a legal issue.[1]

A. *City Law*

1. *General Towing Regulations*

Local laws governing towing in the City are codified in the New York City Administrative Code ("Admin. Code"), Title 20, Chapter 2, Subchapter 31, §§ 20-495 to 20-528 ("Towing Laws"). Regulations implementing the Towing Laws are promulgated by the City's Department of Consumer Affairs ("DCA"), and codified in the Rules of the City of New York ("RCNY"), Title 6, Chapter 2, Subchapter EE, §§ 2-361 to 2-367.

The City's regulatory scheme provides that tow truck businesses and the drivers employed by them must obtain licenses from DCA. Admin. Code § 20-496. To

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[1] In moving for summary judgment simultaneously, both parties asserted that no genuine issues of material fact required a trial or precluded judgment as a matter of law. Plaintiffs subsequently claimed in a second, "opposing" Local Civil Rule 56.1 statement that there *were* disputed issues of fact requiring trial, principally, whether safety and financial responsibility were the true motivations behind several of the City's tow truck regulations. Not only are plaintiffs' asserted factual disputes untimely, unsupported and conclusory, and perhaps even equitably estopped in the context of these motions, but they are also wholly contradicted by plaintiffs' other pleadings and express admissions (as noted below) and are insufficient as an evidentiary matter to create a material issue of fact precluding summary judgment.

operate a DCA-licensed towing business, a towing company must comply with certain requirements specified in the Administrative Code and the accompanying regulations. For example, towing companies must maintain the requisite liability insurance, post a surety bond or cash alternative, and satisfy DCA that its principals have no criminal history. Admin. Code §§ 20-498(a), 20-499, 20-500; 6 RCNY § 2-362(g). Furthermore, each tow truck used by the towing company must comply with State safety requirements and must have affixed to it a DCA license plate indicating this. Admin. Code §§ 20-501, 20-503; 6 RCNY § 2-364(g). A licensed towing business must also comply with specified display, reporting, and recordkeeping requirements. Admin. Code § 20-507; 6 RCNY § 2-363.

Tow truck drivers must themselves satisfy certain criteria in order to obtain the necessary tow truck operator's license. Applicants must be at least eighteen years of age, possess the appropriate driver's license, and satisfy DCA that neither their traffic record nor their criminal record indicates an inability to operate a tow truck safely. Admin. Code § 20-498; 6 RCNY § 2-365. Licensed tow truck operators are in addition subject to reporting requirements, such as reporting a change of address or a loss of their tow truck operator's license, surrendering their operator's license if their driver's license has been suspended or revoked, and notifying DCA if they have been convicted of or pleaded guilty to a crime. 6 RCNY § 2-365.

2. *DARP and SARD Accident Management Programs*

The Towing Laws establish two accident management programs: (1) the Directed Accident Response Program ("DARP"), Admin. Code § 20-518, and (2) the Special Accident Response Districts program ("SARD"), *id.* § 20-518.1. Both programs restrict the towing of certain disabled vehicles to program participants summoned to accident scenes by the City's Police Department.

DARP, initiated in 1987, divides the City into zones; with respect to each zone, DCA maintains a list of qualified towing companies that are summoned to vehicular accident scenes on a rotating basis by the Police Department. There is no limit to the number of DARP participants in a given zone, that is, any towing company satisfying the qualifying criteria may participate in the rotation program. Under current DARP regulations, a disabled accident vehicle weighing 15,000 pounds or less must be removed by an authorized DARP tower summoned by the Police, and cannot be removed by a towing company called separately by the operator of the disabled vehicle.

As discussed in more detail below, that latter provision represents a specific change in the DARP program. As originally enacted, DARP did not preclude motorists from arranging for the removal of their vehicles by the tower of their choice. That "call-your-own-tow" option was eliminated in the 1993 legislation creating SARD, so that motorists now have no choice but to accept the DARP tower assigned to remove their vehicle. Although the tower is required to obtain written authorization for

the tow from the driver (where he or she is able and willing to do so), even if authorization is refused the disabled vehicle will nevertheless be removed by the assigned DARP tower under police order. For this reason, towing in the context of vehicular accidents is deemed to be "nonconsensual," as the vehicle owner has no other lawful towing option.

SARD was first implemented as a demonstration project in 1994 and has been regularly renewed thereafter in selected regions of the City. The program authorizes DCA to designate one or more areas (which in combination do not encompass more than seven police precincts) as Special Accident Response Districts, and to divide each SARD further into zones. One towing company in each SARD zone has responsibility for removing all accident vehicles (weighing 15,000 pounds or less) in the zone for a specified period of time, during which no other towing company may remove any such vehicles or respond to an accident site in the zone, even if called by a motorist at the scene. City regulations limit the number of SARD towers to three per zone; if more than three qualified companies apply, the three program participants are chosen by lottery. Although SARD towers must follow the same regulations concerning written authorization for tows noted above with respect to DARP, SARD towing ultimately is "nonconsensual" as well.

Vehicles not disabled as a result of accidents, *i.e.*, by mechanical failure, do not fall within the DARP or SARD programs, and neither do vehicles weighing more than 15,000 pounds. In order to qualify for participation in either DARP or SARD, a towing company must satisfy certain criteria designed to ensure prompt and adequate

response to accident scenes, and in addition must maintain storage and repair facilities that meet specified requirements.

3. *Legislative History and Origins of DARP and SARD*

Both parties explicitly agree that the DARP and SARD programs were established in order to eliminate a dangerous (and apparently prevalent) practice known as "chasing," in which tow truck operators monitor police radio transmissions to learn of vehicular accidents and then race each other to accident scenes to obtain the resultant towing and repair work. An examination of the legislation underlying these programs demonstrates that the predominant impetus for their enactment was safety. For example, in Local Law 28 of 1987, the precursor of DARP, the City Council found that chasing had been "a persistent and widespread practice," in which "speed limits and other traffic regulations are violated, often posing a substantial threat to life and property." *See* Local Law 28 of 1987 § 1.

The injurious consequences of chasing were documented in the City press release accompanying introduction of the initial DARP program; as cited in the Court's April 25, 1997 Order denying the preliminary injunction, the press release stated that from 1983 until 1986, tow trucks had contributed to seven deaths, approximately 800 personal injuries, 350 incidents of property damage, and 1,200 collisions. Order at 2-3. The legislation authorizing the DARP regulatory scheme "was based on recommendations made by the Tow Truck Task Force, created

by Mayor Edward Koch in response to complaints about reckless driving by tow trucks," and was an attempt to deal with the problem of chasing. *Id.* at 3. The Council found that "the most effective way to curb this practice" was to implement an accident management program that limited the number of towing operators authorized to respond to an accident, and prohibited towers from soliciting business at accident scenes or monitoring police transmissions. Local Law 28 § 1.

This theme was again emphasized in the 1993 legislation authorizing SARD, in which the Council found that "members of the towing industry continue to engage in reckless conduct which threatens life and property" through the "pervasive practice" of chasing. Local Law 112 of 1993 § 1. According to the Council, DARP had "not sufficiently eliminated this problem" because the DARP scheme still permitted vehicle owners to avoid using the designated DARP tower "by choosing to call their own tower." *Id.* DARP's preservation of the "call-your-own-tow" option

> had the unintended result of encouraging towing companies to chase to the accident scene and persuade vehicle owners to accept their services and to declare to police officers that the vehicle owners themselves initiated these contacts.

Id. SARD was the Council's effort to "enhance enforcement" of the accident management program by eliminating the call-your-own-tow option, dividing the City into smaller accident response zones, and limiting the number of companies authorized to provide towing services in those zones. *Id.*

4. *Rotation Tow Program*

The Rotation Tow Program ("ROTOW"), established in 1978, restricts to program participants the removal of vehicles "suspected of having been stolen or abandoned," Local Law 46 of 1978 § 2, as well as certain other unattended vehicles. *See* Admin. Code § 20-519. Towing under ROTOW therefore is nonconsensual, by definition. Like the DARP and SARD schemes for which it served as the prototype, ROTOW divides the City into zones, as to each of which DCA maintains a list of qualified participants who are directed to remove designated unattended vehicles on a rotating basis by the Police Department. ROTOW participants also must meet certain criteria designed to ensure that they can promptly remove designated vehicles from the streets, and must maintain storage facilities that comply with specified requirements. Vehicles removed pursuant to ROTOW generally are held at the tower's storage facility while the Police Department notifies the vehicle owners as to their vehicles' whereabouts.

5. *Towing Rates*

The City's regulatory scheme prescribes maximum rates for all vehicle towing and storage (*e.g.*, $50 for the first mile towed; $10 for each of the first three days stored, etc.), regardless of whether the vehicle was towed pursuant to DARP or SARD, or if the towing fell outside those programs. Admin. Code § 20-509; RCNY § 2-368. Flat rates for towing and storage are prescribed for vehicles towed under ROTOW. Admin. Code § 519(c)(1).

B. *Federal Law*

Plaintiffs argue that the City regulatory scheme discussed above is preempted by Title VI of the FAAA Act of 1994 ("Title VI"), as amended by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), and codified in pertinent part at 49 U.S.C. § 14501(c). Title VI expressly preempts all state and local laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."[2] 49 U.S.C. § 14501(c)(1). Certain state and local regulations, however, are expressly exempted from preemption under the statute. Section 14501(c)(2)(A) provides that Title VI does *not*

> restrict the *safety regulatory authority* of a State with respect to motor vehicles, . . . or the authority of a State to regulate motor carriers with regard to *minimum amounts of financial responsibility* relating to insurance requirements and self-insurance authorization.

49 U.S.C. § 14501(c)(2)(A) (emphasis added). In addition, pursuant to an amendment contained in the ICC Termination Act of 1995, Title VI's prohibition on local regulation

> *does not apply to* the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the *price* of for-hire motor vehicle

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[2] Under the Interstate Commerce Act, of which Title IV is a part, a "motor carrier" is defined as "a person providing motor vehicle transportation for compensation." 49 U.S.C. § 13102(12).

> transportation by a tow truck, *if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.*

49 U.S.C. § 14501(c)(2)(C) (emphasis added).[3]

The parties do not dispute that Title VI preempts state and local regulations governing the intrastate tow truck industry; that conclusion is affirmed in the legislative history of the statute, and particularly the legislative history of the 1995 amendment to Title VI by the ICC Termination Act of 1995.[4] The only questions are (i) whether the City regulations at issue are exempt from preemption under one or more of Title VI's express exceptions, and (ii) whether one provision of Title VI

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[3] The Court's April 25, 1997 Order erroneously indicated that Congress's amendment of Title VI served to exempt from preemption explicitly nonconsensual tows. Order at 6 n.2. As is plain from the text of Section 14501(c)(2)(C), however, the amendment explicitly exempted only those regulations "relating to the *price*" of nonconsensual tows. 49 U.S.C. § 14501(c)(2)(C) (emphasis added).

[4] After conducting a detailed review and analysis of Title VI's legislative history, the court in *Harris County Wrecker Owners v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996), concluded that Section 14501(c) of Title VI

> expresses Congress's intent to preempt state and local regulations related to a price, route, or service of intrastate tow trucking. The legislative history of the ICC Termination Act of 1995 confirms congressional intent to preempt, and nothing in the structure of the Interstate Commerce Act or the relevant case law persuades the court otherwise.

Id. at 724.

exceeds the limits of Congress's authority under the Commerce Clause to preempt local regulations.

STANDARD

Under the Supremacy Clause, "the Laws of the United States . . . shall be the supreme law of the Land- . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl.2. Accordingly, state laws that "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution" will be deemed invalid. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). "A state measure is preempted when it is impossible to comply with both state and local law, or the state law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress." *Richmond Boro Gun Club, Inc.*, 97 F.3d 681, 687 (2d. Cir. 1996) (citing *California v. Federal Energy Regulatory Comm'n*, 495 U.S. 490, 506 (1990)). Congress may also preempt state law by creating legislation so comprehensive that it leaves no room for state legislation, or by explicitly preempting state law in its federal statute. *See New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 118 (2d Cir. 1989) (citing cases).

There is, however, a strong presumption against federal preemption, especially in areas traditionally occupied by the States. *Richmond Boro Gun Club*, 97 F.3d at 687; *see also Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996); *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). "This presumption is especially strong in areas . . . such as health and safety measures." *Richmond Boro Gun Club*, 97

F.3d at 687 (citing *English*, 496 U.S. at 79). The Second Circuit has ruled that a Court "should only find that a state or local law is preempted by congressional legislation if it determines that Congress intended such preemption." *Richmond Boro Gun Club*, 97 F.3d at 687 (citations omitted). There must be a "clear and manifest purpose of Congress" to preempt. *Toy Manufacturers of America, Inc. v. Blumenthal*, 986 F.2d 615, 620 (2d Cir. 1992). Thus, "the purpose of Congress is the ultimate touchstone" in every preemption case. *Medtronic, Inc.*, 116 S. Ct. at 2250.

In evaluating a statute under preemption analysis, a Court must consider the text of the federal statute as well as the Congressional purpose. *Medtronic, Inc.*, 116 S. Ct. at 2250. "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Id.* at 2250-2251. The "structure and purpose of the statute as a whole" may also be considered. *Id.* And even with a clear expression of intent to preempt state and local regulation, a Court must still determine the scope of preemption. *Id.* at 2250.

Under the well-established standard, summary judgment may be granted only when the submissions of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating the absence of a material factual issue, and if the moving party carries its burden the opposing party must "set forth specific facts showing that there is a genuine issue for trial," without resting on "mere allegations or denials" of the facts asserted by the movant. Fed. R. Civ.

P. 56(e). In this case, where both parties have moved for summary judgment simultaneously asserting the lack of a genuine factual dispute, the only issue is which party has demonstrated its entitlement to judgment as a matter of law.

DISCUSSION

The City seeks to dismiss plaintiffs' Complaint on the ground that, even though Title VI preempts municipal regulation of the tow truck business, all of the City laws at issue here – with one exception – *either* (a) fall within Title VI's express exemptions for safety, financial accountability, or nonconsensual towing rates, *or* (b) fall outside the scope of Title VI's preemptive reach. The one exception relates to the City regulations prescribing maximum rates for *consensual* tows, *i.e.*, tows occurring outside the accident context, where the vehicle owner is present at the scene and may lawfully choose the company that he or she wishes to tow the vehicle and may bargain for a competitive price. The City concedes that such restriction of consensual towing rates violates Title VI, but argues that the regulation should nonetheless be upheld because in this respect Title VI violates the Commerce Clause of the United States Constitution.

Plaintiffs acknowledge that Title VI contains explicit exceptions to preemption for legitimate safety regulations, financial accountability constraints, and nonconsensual towing rates, but contend that none of the regulations at issue fall within those exceptions, and therefore that virtually the entire City regulatory scheme is expressly preempted by the plain language of Title VI.

Specifically, plaintiffs argue that the City's accident management programs fall outside Title VI's safety exception for two reasons: (a) the programs are in reality economic measures that regulate market participation; and (b) the programs regulate in areas far beyond the narrow class of motor vehicle safety rules that were intended to be exempted under the federal statute.[5] As to towing rates, plaintiffs concede that maximum rates for nonconsensual tows are explicitly permitted under Title VI, but dispute that Congress's preemption of maximum rates for consensual tows is in violation of the Commerce Clause.

There is little doubt that Congress has expressly preempted the intrastate towing industry from local regulation through Section 14501(c) of Title VI. *See Harris County Wreckers Owners v. City of Houston*, 943 F. Supp. 711, 724 (S.D. Tex. 1996). Nevertheless, the Court finds it equally as clear that all of the City regulations challenged in this action – with one acknowledged exception for

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[5] Plaintiffs also assert as a ground for preemption that "there is not a single word in the [City's] DARP or SARD laws or rules prohibiting racing to the scene of accident [sic], or any other safety provision." This argument borders on the frivolous. As the City points out, the DARP/SARD program expressly authorizes one designated towing company in a given zone to respond to accidents during a particular time period, and specifically prohibits (and prescribes penalties for) responses by unauthorized towers. Whether or not these rules explicitly mention the word "chasing," they surely are directed toward eliminating the practice and constitute a rational, and at least to some extent effective, means of achieving that result. In any event, the extensive legislative history behind the programs (noted above) does repeatedly specify that the evil to be remedied by the regulations is tow truck chasing.

consensual towing rates – are exempt from Title VI's preemptive effect under one or more of the statute's express exceptions. The City's prescription of maximum rates for consensual tows, however, is indeed preempted, as the City concedes, and the Court concludes that this aspect of Title VI does not contravene the Commerce Clause.

A. *Accident Management and "Nonconsensual" Towing Programs*

The City's DARP and SARD programs, adopted by the City Council expressly and unequivocally for the purpose of eradicating the problem of accident "chasing" in the tow truck industry, plainly fall within Title VI's exemption for local laws that effectuate a municipality's "safety regulatory authority . . . with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A).[6] Indeed, plaintiffs' present arguments to the contrary are undermined altogether by their numerous explicit concessions regarding the origins and purpose of the City's regulatory scheme. For example, plaintiffs admit in their statement of uncontested facts (pursuant to Local Civil Rule 56.1) that the DARP and SARD "programs were established to eliminate a dangerous practice known as 'chasing,' " and elsewhere flatly declare that "[t]here is no dispute that the legislative purpose in adopting these programs, was to

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[6] Plaintiffs do not dispute that the exception provided by Section 14501(c)(2)(A), limited in terms to the "safety regulatory authority of a *State*," *id.* (emphasis added), applies as well to the safety regulatory authority of a *municipality* such as the City. *See Harris County*, 943 F. Supp. at 726-27.

eliminate the chase to the scene of accidents with tow trucks intent on securing the 'repair work.' "

In these circumstances, the Court is hard-pressed to find that the DARP and SARD programs are anything other than "safety regulat[ions]" expressly exempted from preemption under Title VI. Any regulatory scheme rationally directed toward ameliorating the patently dangerous practice of chasing would seem clearly to fall within the exemption, and the DARP and SARD schemes easily satisfy this lenient "rational basis" standard.[7] The ROTOW program, enacted for the purpose of removing abandoned and stolen vehicles that may (for example) present hazards to other motorists or opportunities for misuse to criminals or children, also plainly constitutes a "safety regulatory" measure exempt from Title VI preemption, and plaintiffs do not seriously contend otherwise.

As noted, plaintiffs first argue that the City's accident management programs restrict market participation and therefore constitute not legitimate safety regulations but instead nonexempt economic measures. That contention

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[7] In this vein, plaintiffs arguments that "nothing in the laws or regulations at issue indicate or suggest anything to prevent chasing or to militate against it," and that "other more desirable ways of dealing with the perceived problem . . . are available," are misplaced. It is of no concern to this Court whether the City's chosen regulatory scheme is the best, or even an especially effective, means of implementing its plainly legitimate safety goals; such matters are solely for the relevant legislative body, the City Council, to decide. *See, e.g., Beatie v. City of New York*, 1997 WL 535172, at *4-*5 (2d Cir. Sept. 2, 1997) (discussing rational basis standard).

fails in light of the plain terms and legislative history of the City's programs. DARP and ROTOW operate through rotation calling systems; there simply is no limit to the number of qualified towers that can participate in the programs. To the extent that plaintiffs argue that the qualifying criteria for entry into the programs (licensing, bonding, etc.) comprise economic means for excluding participants, the Court notes that the qualifying criteria *for those programs* do not in any way restrict towers from entering any of the other towing services markets in the City or elsewhere. In any event, as explained in more detail below, the Court finds that all of the qualifying criteria are legitimate safety (or financial accountability) regulations designed to ensure that the City's programs are implemented effectively and securely, and are rationally directed toward that goal. *See also* Footnote 7 *supra*.

While it is true that participation in the SARD program is limited to three towers per zone, the Court finds this aspect of the regulation to be a legitimate, non-economic requirement related exclusively to safety concerns. The legislative findings underlying SARD demonstrate that the City Council adopted the restrictive provision specifically and solely as a means of effectuating the anti-chasing program:

> By limiting the number of companies that service a zone, the appropriate enforcement agencies will be better able to enforce against those towers who illegally monitor police radios and chase to accident scenes to solicit towing and repair work. This system would also encourage the towers to report violations by chasers who are not authorized to service the zone.

Local Law 112 of 1993 § 1. Plaintiffs point to no legislative history or other information indicating that the limitation on participation was motivated by, or related to, economic concerns of the City. *Cf. Harris County*, 943 F. Supp. at 729-32 (finding that Houston's procedures for determining how many emergency tower permits to issue, and to whom, regulated market participation primarily for economic reasons unrelated to safety). And to the extent that plaintiffs argue that the City's adoption of a restricted rotation program is not the type of regulatory scheme intended to be exempted under the Title VI's safety exception, that argument is addressed – and rejected – in the immediately following paragraphs.

Plaintiffs' primary argument against exemption of the City's accident management and nonconsensual towing programs, as made clear at oral argument on this motion, is that the "safety regulatory" exception contained in Title VI, properly construed, concerns only the narrow subject of "motor vehicle safety" regulations, and not the broader issue of public safety and welfare regulations promulgated under a local government's police power. Specifically, plaintiffs contend that the exemption in Section 14501(c)(2)(A) is intended only to cover matters such as inspections of brakes, windshield wipers, and other safety features on motor vehicles, and does not extend to municipal accident management and traffic prevention programs. The Court finds no support for such a constricted reading of Title VI in either the statute's plain language or legislative history, in the relevant case law, or in any of the submissions of the parties.

First, the text of Section 14501(c)(2)(A) at issue states simply that the preemption of local trucking regulations

enacted by Title VI "shall not restrict the safety regulatory authority of a State with respect to motor vehicles." 49 U.S.C. § 14501(c)(2)(A). There is absolutely nothing in that language to indicate that this statutory caveat is limited – as plaintiffs would have this Court find – to regulations governing the physical soundness of a motor vehicle's constituent mechanisms. Indeed, the Court finds the language unreservedly broad, potentially encompassing (for example) regulations ranging from restrictions on the age at which a driver's license may be obtained to statutory definitions of legal drunkenness linked to blood-alcohol levels – as well as to programs limiting the number of tow trucks that can respond to an accident in a given geographical region.[8]

Moreover, plaintiffs offer no secondary sources, including not a single relevant citation to legislative history, sufficient to overcome the apparent plain meaning of the broadly-worded text. Conversely, the Court finds from its own research that the limited legislative history that does bear on the scope of the "safety regulatory" exception confirms the broad meaning conveyed by the text. For example, the House Conference Report describing Section 14501(c) explains that the exemption provision

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[8] The statutory definition of "motor vehicle" – "a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation," but not including rail or wire based trains or trolleys – is similarly broad and certainly provides no support for plaintiffs' position. *See* 49 U.S.C. § 13102(14).

> emphasizes that State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route, or service and thus is unaffected.

H.R. Conf. Rep. No. 103-677 (1994), reprinted in 1994 U.S.C.C.A.N. 1715, 1757. Elsewhere, in addressing concerns that the new provision "may be construed as granting States additional authority to regulate in those enumerated areas rather than simply stressing that the preemption provisions do not apply to those areas," the Conference Report reiterates:

> nothing in these new subsections contains a new grant of Federal authority to a State to regulate commerce and nothing in these sections amends other Federal statutes that govern the ability of States to impose safety requirements, hazardous materials routing matters, truck size and weight restrictions or financial responsibility requirements[, etc.]

Id. at 1756. Finally, the Conference Report notes that the American Trucking Association had acceded to federal preemption of state regulation of trucking rates and entry based on economic factors, albeit

> with some conditions that would allow regulatory protection to continue for non-economic factors, such as liability rules, . . . insurance, safety, leasing, and cargo credit rules. The conferees have attempted to address these conditions in Section [14501(c)(2)]. . . .

Id. at 1760 (internal quotations omitted).

The point of citing these vague and general references to the safety exception – the fullest and most direct such references in the relevant history – is precisely to emphasize that they are vague and general, and are accompanied by no additional qualifying or explanatory discourse. The context and content of Congress's description of the provision certainly do not suggest that it is to be read narrowly or in any way restricted to regulations governing the mechanical safety of motor vehicles; to the contrary, the legislative history indicates that the safety exception is to be interpreted in keeping with the broadly-worded statutory text. Absent strong proof of a contrary congressional intent, the Court declines to read Section 14501(c)(2)(A) in a manner at odds with its unrestricted outward meaning.

The Court finds support for its construction of Title VI's "safety regulatory" exemption in *Harris County Wreckers Owners v. City of Houston*, 943 F. Supp. 711 (S.D. Tex. 1996), the only directly comparable case of which the Court is aware. In *Harris County*, the court rejected the city of Houston's claim that its tow truck regulations constituted exempt safety measures; after thoroughly reviewing the legislative history of the regulations, the court concluded that Houston had "us[ed] its regulatory powers to alleviate [a] recognized market failure while promoting various economic, community development, and social policies," and therefore that certain provisions "primarily regulate market participation for purposes other than safety, and are thus preempted." *Id.* at 729, 732. Most significant with regard to this case, however, the *Harris County* court also stated that its ruling did *not*

> preclude the city from enacting regulations designed to meet the legitimate safety concerns about wrecker congestion at the scene of accidents and arrests. For example, *the city might choose to . . . adopt a rotation system within geographical service areas that limits the number of emergency wreckers that can arrive at the scene of an accident or arrest.* Such a system would address the city's safety related concerns without controlling market participation based on concerns unrelated to safety.

Id. at 732 (emphasis added) (footnote omitted). Thus, the court in *Harris County* likewise concluded that Title VI's "safety regulatory" exception encompasses a far broader range of municipal regulation than mere "motor vehicle safety" rules, finding that a service area rotation system designed to limit tower response to accident scenes – precisely the scheme instituted in this case by the City's DARP and SARD programs – falls comfortably within that exception.

Based on an extensive analysis of City legislative history in *this* case, the Court finds that the DARP and SARD programs were *not* passed "primarily [to] regulate market participation for purposes other than safety." *Id.* at 729. Rather, as described above, the motivation behind these regulations was unquestionably (and admittedly) the eradication of tow truck "chasing" and its attendant dangers. Moreover, the Court concludes that the regulatory scheme implemented to remedy this problem plainly constitutes an exercise of the City's "safety regulatory authority . . . with respect to motor vehicles," 49 U.S.C.

§ 14501(c)(2)(A), that is exempted from Title VI preemption under the plain meaning of that broad, express statutory exception. In sum, the City's DARP, SARD, and ROTOW programs are not preempted by Federal law.

B. *Licensing and Eligibility Requirements*

Plaintiffs argue that many of the underlying criteria for entry into the City's accident management programs are economic regulations not exempted from preemption by any exception contained in Title VI. Specifically, plaintiffs assert that the City's licensing, display, reporting, recordkeeping, and criminal history rules, as well as the requirement that participants in DARP and SARD maintain storage and repair facilities, are in no way related to safety or financial accountability objectives, and therefore are preempted by Title VI. Simply put, the Court disagrees; to the extent that these eligibility rules are not (as mentioned above) directly and obviously addressed to safety or financial accountability concerns – such as the requirements that truck operators have acceptable criminal and driving records – the rules are part and parcel of the City's safety-motivated accident management scheme, and integral to it.

To take only one example cited by plaintiffs, the Court finds that the storage and repair facility requirements are plainly safety-related measures. Manifestly, disabled vehicles towed away from accident scenes must be stored in adequate facilities where they will be secure from theft or further damage, and almost all of these vehicles (if not unsalvageable) will require some type of repair work. It makes sense, therefore, to require the

company that actually tows a vehicle to maintain facilities for storing and repairing that vehicle on its premises; not only does this ensure that the motorist involved in the accident will be able reasonably to locate their vehicle and have at least one available repair option, but it also cuts down the number of disruptive and potentially hazardous tows of (perhaps badly) damaged vehicles from one facility to another, and in addition reduces incentives for under-the-table dealing between towing companies and separate storage or repairing firms with whom they would otherwise have to operate. In short, there are numerous safety-related justifications for requiring towing companies to maintain storage and repair facilities.

Plaintiffs have failed to demonstrate that any of the City's tow truck licensing requirements, or any of the eligibility criteria for participation in DARP, SARD, or ROTOW, fall outside the safety or financial accountability exceptions contained in Title VI.[9] Accordingly, all of those

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[9] Relying on the decision in *Rhode Island Public Towing Ass'n v. State of Rhode Island*, No. 96 Civ. 454 (ML), 1997 WL 135571 (D.R.I. Feb. 28, 1997), the City argues that to the extent any of its storage and repair regulations (such as maximum storage rate requirements) fall outside of the "safety regulatory" exception, those regulations are nevertheless beyond the scope of Title VI – and thus not preempted – because they do not concern *transportation* of property by a motor carrier. *See id.* at *5-*9. Because plaintiffs have never attempted to draw such a distinction between the different storage and repair regulations, and because the Court has determined that all of the storage and repair regulations brought to its attention are exempt from preemption under Title VI's safety exception, the Court need not reach the City's alternative argument.

regulations are exempt from preemption under Section 14501(c)(2)(A).

C. *Towing Rate Regulations*

Section 20-509 in Subsection 31 of the City's Administrative Code prescribes a single, maximum rate scheme for all vehicle towing and storage, whether or not resulting from an accident, or pursuant to DARP or SARD.[10] It is undisputed that the City's rate regulation, to the extent that it sets prices for *nonconsensual* towing – that is, towing in the DARP, SARD, or ROTOW contexts – is expressly exempt from preemption by Section 14501(c)(2)(C) of Title VI.[11] It is likewise undisputed that the City's regulation is preempted by Title VI to the extent that it regulates the rates for *consensual* towing, *i.e.*, towing that occurs outside the DARP/SARD/ROTOW context, as in the case of mechanical failure. The only issue is whether the City's regulation of consensual towing rates is nonetheless permissible because, according to

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[10] ROTOW rates, as noted above, are set forth in Admin.Code § 20-519.

[11] Based on the fact that City regulations require designated DARP/SARD towers to remove accident vehicles with or without motorist consent, plaintiffs attempt to distinguish DARP/SARD towing from nonconsensual towing "in the pure sense, performed when the owner or operator is incapable of arranging his own tow (not prohibited from doing so)." But plaintiffs furnish absolutely no support for such a distinction, or for their conclusory assertion that only the price of the latter form of towing – and *not* DARP/SARD towing – "is excepted from the preemption of price regulation."

the City's argument, Title VI's preemption of this rate-setting function is unconstitutional.

The City's contention that a prohibition on local regulation of consensual towing rates violates the Commerce Clause is meritless. The City concedes that "[i]n enacting Title VI, Congress made the express finding that state regulation of intrastate motor carrier[s] substantially affects interstate commerce," and that Congress's findings were "supported by the House Report that accompanied Title VI." The City asserts, however, that Congress's findings were "conclusory" and "unreasonable insofar as they set forth no basis for regulating the other forms of intrastate transportation within the scope of Title VI," or explaining "how local regulation of intrastate towing operations substantially affects interstate commerce." According to the City, its towing regulations have, "at most, an incidental effect on interstate commerce."

The court in *Harris County* rejected a nearly identical claim by the city of Houston, that "Congress failed to make a finding that municipal towing has a 'substantial effect on interstate commerce' " in passing Section 14501(c). 943 F. Supp. at 732. Citing the same explicit congressional findings scorned by the City here, the *Harris County* court concluded that Congress's findings of substantial effects on interstate commerce were "rational and reasonably adapted to the end permitted by the Constitution." *Id.* at 733. The City contends that the ruling in *Harris County* was "based on superficial and perfunctory reasoning," but this Court disagrees; indeed, the Court finds that it is the City's analysis that is conclusory. The City presents no support for its assertion that local

regulation of towing is different from – or has a lesser effect upon interstate commerce than – local regulation of intrastate trucking, which the City essentially concedes is a permissible subject of congressional regulation.

In these circumstances, the Court agrees with the *Harris County* court and concludes that Congress, in enacting Title VI, made sufficient specific findings of a substantial effect on interstate commerce to justify its regulation of the intrastate towing business. *See, e.g., United States v. Lopez*, 514 U.S. 558-63 (1995). The City's regulation of towing rates for transactions occurring outside of the nonconsensual towing context is therefore preempted by Title VI and may not be enforced.

CONCLUSION

The City's regulatory scheme governing the municipal towing industry is exempt from preemption under Section 14501(c)(2) of Title VI, with the exception of the regulations addressed to maximum rates for consensual tows. Those latter regulations are preempted by Title VI, and the City is permanently enjoined from enforcing them. Plaintiffs' motion for summary judgment is granted with respect to its consensual tow-rate claim, but is denied as to all other claims. Accordingly, the City's motion for summary judgment is granted with respect to all of plaintiffs' remaining claims (other than the consensual tow-rate claim), which are dismissed with prejudice. The Clerk of Court shall enter partial judgment for plaintiffs and partial judgment for the City, and close the case.

SO ORDERED:

Dated: New York, New York
October 27, 1997

/s/ Denise Cote
DENISE COTE
United States District Judge

Supreme Court, U.S.
FILED
JUL 23 1999
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No. 99-3

IN THE
Supreme Court of the United States

ACE AUTO BODY & TOWING LTD, *et al.*,
Petitioner,
v.
THE CITY OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE TOWING AND RECOVERY ASSOCIATION OF AMERICA AND THE UNITED MOTORCOACH ASSOCIATION IN SUPPORT OF THE PETITION

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July 23, 1999

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QUESTIONS PRESENTED

Whether 49 U.S.C. § 14501(c) permits only States to regulate motor carrier safety and preempts political subdivisions altogether from enacting or enforcing laws regulating motor carrier safety as the Court of Appeals for the Eleventh Circuit has held, or, as held by the Court of Appeals for the Second Circuit, Congress has implicitly authorized States to delegate such regulatory authority to their political subdivisions.

Whether State goverment, in exercising authority under 49 U.S.C. § 14501(c)(2)(A), can impose a licensing requirement.

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BRIEF *AMICI CURIAE* OF THE TOWING AND RECOVERY ASSOCIATION OF AMERICA AND THE UNITED MOTORCOACH ASSOCIATION IN SUPPORT OF THE PETITION

Pursuant to Rule 37.3 of the Rules of this Court, and with the accompanying written consents of the parties, Towing and Recovery Association of America and United Motorcoach Association submit this brief as amicus curie in support of the petition.*

STATEMENT OF INTEREST

Towing and Recovery Association of America ("TRAA") is the national association of motor carriers

* This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae* made a monetary contribution to the preparation and submission of this brief.

engaged in the towing and recovery [1] of motor vehicles. TRAA is a federation of fifty state towing and recovery associations and the towing recovery association of the District of Columbia. Together with its fifty-one affiliated associations, TRAA currently represents more than 5000 motor carriers nationwide that engage in towing and recovery operations involving every type and size of motor vehicle that is operated on our Nation's highways.

United Motorcoach Association ("UMA") is the largest trade association of professional motorcoach and bus operating companies in North America. UMA represents more than 850 commercial and private companies nationwide. UMA's member companies provide a full range of passenger services to the public, including scheduled intercity regular route, charter, tour, special operations, school and public transit. UMA also represents some 200 motorcoach and bus manufacturers as well as the motorcoach industry's suppliers and vendors.

Amici have grave concerns regarding the broad effect of the Court of Appeals for the Second Circuit's conclusion that, notwithstanding 49 U.S.C. § 14501(c)(2)'s express preemption of a local government's *direct* regulation of motor carrier safety, local governments may nonetheless exercise such regulatory authority indirectly, through the State's delegation of its authority. As explained below, the Second Circuit's reading of the statute creates a circuit split, effectively nullifies the preemption expressly imposed on local government by § 14501(c)(2)(A), and thereby ushers in the opportunity for local governments

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[1] As used by the towing and recovery segment of the motor carrier industry, "recovery" operations involve the relocation of disabled vehicles in order that they can be towed or moved under their own power; for example, by righting an overturned tank truck, or by pulling a bus out of a ditch. Recovery operations typically require the use of specialized operator skills and equipment, including hydraulic booms and winches, cables, and dollies.

throughout the nation to exercise regulatory authority over motor and air carriers which Congress clearly did not intend for them to have. *Amici* offer the Court their important perspective on the crucial questions presented.

STATEMENT OF CASE

This case presents a fundamental question concerning what, if any, regulatory authority Congress intended to reserve for States and political subdivisions under 49 U.S.C. § 14501(c)(2). Section 14501(c)(2) provides a limited exception to what is otherwise a general preemption of State and local regulation by § 14501(c)(1).[2] Under the latter provision, "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier" of property. Section 14501(c)(1) is virtually identical to 49 U.S.C. § 41713 (b)(1), which the Court considered in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), and found "to express a broad preemptive purpose." *Id.* at 384.

Section 14501(c)(2), however, provides in relevant part that § 14501(c)(1)'s preemption does not restrict:

> the safety regulatory authority of a *State* with respect to motor vehicles, the authority of a *State* to impose highway route controls and limitations based on the size or weight of the motor vehicles or the hazardous nature of the cargo, or the authority of a *State* to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 U.S.C. § 14501(c)(2)(A). (Emphasis supplied.)

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[2] The terms "political subdivision" and "local governments" are used interchangeably throughout this Brief.

In the case below, the Second Circuit considered whether laws of New York City, purportedly issued for reasons of safety, but designed and intended to license and thereby limit the particular tow truck companies authorized to provide towing services from scenes of accidents occurring in New York City, fell within the scope of the regulatory authority excepted from preemption by 49 U.S.C. § 14501(c)(2). Fnding New York City's laws to be safety-based, the Second Circuit held the ordinance was within the exception's scope and therefore not preempted, concluding that even though "the text of § 14501 (c)(2)(A), unlike other subsections of § 14501, fails to preserve explicitly the regulatory authority of the political subdivisions of the State . . . we see no reason to construe this language to prevent the State from delegating *its* regulatory authority to a municipality." (Pet. App. 20) (Italics in original.)

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision raises fundamental questions concerning the authority of political subdivisions to regulate motor carriers at all, which affects the operations of not only towing companies, but also any and potentially every other motor carrier of property or passenger throughout the country. Thus the significance and impact of this case is far greater than the Second Circuit's focus on a towing law specifically considered or would suggest.

I. THE DECISION BELOW CONFLICTS WITH THE ELEVENTH CIRCUIT'S DECISION IN *CITY OF ATLANTA*

The Second Circuit's reading of 49 U.S.C. § 14501 (c)(2)(A) conflicts directly with the Eleventh Circuit's decision in *R. Mayer of Atlanta, Inc. v. City of Atlanta (City of Atlanta)*, 158 F.3d 538 (11th Cir. 1998), *cert.*

denied, — U.S. —, 119 S. Ct. 1334 (1999), which the Second Circuit expressly "decline[d] to follow." (Pet. App. 20-22.) As in the instant case, *City of Atlanta* involved a municipality's safety regulations governing towing. However, the Eleventh Circuit, unlike the Second, has held that, while 49 U.S.C. § 14501(c)(2)(A) exempts State safety regulatory authority from preemption, it preempts such regulatory authority when exercised by local or municipal governments.

In reaching its exact opposite statutory interpretation of § 14501(c)(2)(A), the Eleventh Circuit relied, in part, upon the Court's statutory analysis in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994), wherein the Court instructed "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." 158 F.3d at 545. The Eleventh Circuit found particularly compelling therefore that "§ 14501 contains no fewer than seven express references to the regulatory authority of political provisions in its other subsections, but omits any references to political subdivisions in § 14501(c)(2)(A)," *id.*, and that "§ 14501(c)(2)(A) is the only subsection of the statute that mentions the regulatory authority of the States' *without also mentioning* the regulatory authority of the State's political subdivisions." *Id.* (internal citations omitted) (emphasis supplied). The Eleventh Circuit's reasoning and conclusion was further reinforced by its finding that the omission of the reference to "political subdivisions" in § 14501 (c)(2)(A) does not "reflect[] a drafting error, because a similar preemption provision contained in the Airline Deregulation Act, 49 U.S.C. 41713(b)(4)(B)(I), contains the same omission." *Id.* at 546. Indeed, although 49 U.S.C. § 14501(c)(2) applies to motor carriers of property, the identical language is found also in 49 U.S.C.

§ 14501(a)(1), which pertains to motor carriers of passengers, and in 49 U.S.C. § 41713(b)(4), pertaining to air carriers.

Congress was well aware of the scope of the definition it chose for "State" when § 14501(c) was enacted. *Amici* know of at least sixteen instances in which "State" is defined in title 49, United States Code and the same definition was not used in each provision. To the contrary, the definition specifically selected by Congress was based on the statute's particular purpose and the use to which the definition would be applied. In six of these instances, "State" is defined as the States of the United States, the District of Columbia, Puerto Rico and the territories. In two instances, "State" is defined as the States of the United States, the District of Columbia and Puerto Rico. In four instances, "State" is defined as States of the United States and the District of Columbia. In one instance, "State" is defined as the States of the United States, except Alaska and Hawaii, and the District of Columbia. In one instance, "State" is defined as the States of the United States, the District of Columbia, and the political subdivisions of the States. And, in two instances where the controlling definition of "State" would otherwise have excluded local government, "political subdivisions" was specifically inserted into the provision; *see* 49 U.S.C. §§ 14503 and 33118. Had Congress intended for political subdivisions to have regulatory authority under § 14501(c)(2)(A) it would have provided for that explicitly in the statute and not, as the Second Circuit holds, implicitly through State delegation.

Without mention of the Court's decision in *Resolution Trust Corp.*, or its above-cited guidance on statutory construction, the Second Circuit instead took its lead from the Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) in reaching the outcome below. While two

of the Court's instructions in *Medtronic* may have some relevancy to this case ("the scope of a pre-emption statute must rest primarily on a 'fair understanding of *congressional purpose*,'" 518 U.S. at 485-86 (citation omitted) (emphasis in original), and Congressional intent "primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it" *id.* at 486 (citation omitted) the Second Circuit's citation to and reliance on *Medtronic* was for neither proposition, but rather for *Medtronic's* general presumption against the preemption of State police authority. Pet. App. 10, 19 and 22. *Amici* submit that, in the latter regard, application of *Medtronic* general presumption is inapposite to § 14501(c) on factual grounds and, therefore, to the matter before this Court.

In *Medtronic*, the Court was asked to consider whether Congress, through the Medical Device Amendments of 1976, had "effectively precluded State courts from affording State consumers *any protection* from injuries resulting from a defective medical device." 518 U.S., at — (emphasis supplied). As the Court pointed out, Medtronic's reading of the statute would have had "the perverse effect of granting *complete immunity* from design defect liability to an entire industry that, in the judgment of Congress needed more stringent regulation . . . [and] remove all means of judicial recourse for those injured by illegal conduct." *Id.* (citations omitted).

The Eleventh Circuit's reading of the statute falls far short of yielding any such "perverse" result. Rather, and consistent with the statute's express wording, even though the Eleventh Circuit's construction of § 14501(c)(2)(A) would foreclose exercise by local governments of some aspect of their regulatory authority, it would not result in giving motor carriers complete immunity from safety regulation. Localities and States would still have the ability

to protect the health and safety of their citizens, but the exercise would be solely by State law or regulation. Thus, in stark contrast to *Medtronic*, § 14501(c)(2)(A) does not present the question of whether fundamental rights of citizens to petition for relief has altogether been taken away by Congress, but rather at what level of government it is appropriate for such relief to occur. In § 14501 (c)(2)(A), Congress said it is appropriate for safety regulation to occur at the state level but not at the local level. *Amici* submit that any predicate underlying the Court's application of its presumption in *Medtronic* therefore is not present here and its application to § 14501 (c)(2)(A), as an appropriate canon of construction, is clearly unwarranted.

Also inapposite is *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1996), which construed preemption of pesticide regulation by local governments under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, 7 U.S.C. 136, *et seq.* Although the Second Circuit only briefly mention *Mortier* (Pet. App. 21), the Eleventh Circuit considered at some length whether *Mortier* "compels a contrary conclusion," *id.* at 546, concluding that *Mortier* "falls short of establishing a rule that the word 'state' must be interpreted to include political subdivisions in all circumstances," *id.* at 547, and "can be distingiushed on its facts, and its construction of the word 'State' need not govern our analysis." *Id.* at 547.

The conflict between the Second Circuit and Eleventh Circuit is significant. If not resolved by the Court, local governments outside of the Eleventh Circuit will have reason, or at the very least the opportunity, to view the Second Circuit's reading of § 14501(c)(2)(A) as the correct statutory interpretation, thereby giving justification to impose their respective set of unique operating restric-

tions on motor carriers performing transportation services within their borders. This was not what Congress intended and the Court should grant certiorari to resolve the circuit conflict between the decision below and the Eleventh Circuit's decision in *City of Atlanta.*

II. THE DECISION BELOW NULLIFIES THE LICENSING PREEMPTION CONGRESS INTENDED

Section 14501(c)'s express use of "motor carriers" provides clear evidence that Congress did not intend for its application, including the limited exception of § 14501(c)(2)(A), to apply solely to towing companies. To the contrary, § 14501(c) was clearly intended to apply to State and local regulation of "motor carriers" in general. H.R. Conf. Rep. 103-677, at 85 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1757. By focusing its analysis of the challenged New York City laws solely as regulations being applied to towing ("To the extent the text's usage of the term 'motor vehicles' . . . does not exclude the possibility of interpreting the phrase 'safety regulatory authority . . . with respect to motor vehicles' to encompass the authority to enact safety regulations with respect to motor vehicle accidents and breakdowns," Pet. App. 18), the Second Circuit's analysis has read out from § 14501(c)(2)(A) the broader motor carrier context in which Congress had intended it would be applied.

It was in this broader statutory context and recognition of the statute's prospective application to a greater class of motor carriers than towing companies that the Eleventh Circuit, in contrast to the Second Circuit, construed § 14501(c)(2)(A). If read as though the statute was intended to be applied solely to towing companies operating entirely and exclusively within the borders of one city or town, the Second Circuit's reading of § 14501(c)(2)(A) may, for sake of argument, make sense. However,

those were not the facts below. Neither is that the marketplace environment in which Congress understood towing companies or any other motor carriers exclusively operate. Indeed, Congress understood that even those motor carriers which operate exclusively in intrastate commerce may nonetheless be operating in inter-city commerce. Because the vast majority of motor carriers do not operate exclusively within the borders of a single city, *i.e.*, do not operate in intra-city commerce, Congress undertood the need to preempt, and did preempt, local governments from having the means and opportunity to regulate in this area. As the Eleventh Circuit explained, "[b]y withholding the authority to enact safety and insurance regulations from political subdivisions, Congress ensured that counties and municipalities would not enact differing (and perhaps inconsistent) sets of safety and insurance ordinances," 158 F.3d at 546 (parenthetical in original).

However, in addition to holding that political subdivisions may exercise regulatory authority, the Second Circuit's reading of the statute permits States and political subdivisions to exercise regulatory authority over motor carriers in a manner which Congress clearly did not intend —licensing. Under any analysis, including even the Second Circuit's (Pet. App. 22-24), New York City's towing laws operate as and must be viewed as motor carrier operating authority.

The language of § 14501(c)(1) was modeled after virtually identical preemption language contained in the Airline Deregulation Act of 1978, 49 U.S.C. § 41713 (b)(1), language which the Court has held is to be broadly construed. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). A fundamental purpose of § 14501(c)'s broad preemption was to prevent State and local governments from either continuing to regulate or

initiating new regulations having any connection with rates, routes or services, including through the imposition of licensing requirements. Congress was therefore concerned that § 14501(c)(2)(A)'s limited exception could improperly be used to circumvent the broad preemption imposed by § 14501(c)(1) and instructed that § 14501 (c)(2)(A) was not intended for this purpose:

> There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes or services, may instead attempt to regulate intrastate trucking markets through its unaffected authority to regulate such matters such as safety, vehicle size and weight, insurance and self-insurance requirements, hazardous materials routing matters. The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.

H.R. Conf. Rep. 103-677, *supra* at 84 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1756. While its decision below may acknowledge the foregoing Congressional admonition, Pet. App. 13, the Second Circuit nonetheless summarily dismissed it, or a least gave it the least weight, stating:

> the City's requirements regarding *licensing*, display of information, reporting, recordkeeping, criminal history, insurance, posting of bond, and maintenance of storage and repair facilities . . . are so directly related to safety or financial responsibility and impose so peripheral and incidental an economic burden that no detailed analysis is necessary they fall within the § 14501(c)(2)(A) exemptions.

Pet. App. 22-23 (emphasis supplied).

Under the Second Circuit's reading of the statute, therefore, the imposition by local and State governments of

licensing and related requirements, if done for safety purposes, is permissible. Moreover, the Second Circuit reads the statute to impose a presumptive evidentiary standard and burden of proof on industry which the statute does not. According to the Second Circuit, local and State governments need merely to assert safety as the purpose for their licensing requirement to avoid preemption, and at best only licensing and related requirements which industry must demonstrate impose more than peripheral or incidental economic burdens might not withstand scrutiny.

Clearly, the Second Circuit's reading of § 14501(c) is not what the statute says or how Congress intended for it to be read. Through enactment of § 14501(c)(1), Congress intended to preempt all local and State licensing of motor carriers. While Congress may have allowed State governments to exercise some safety regulatory authority over motor carriers, Congress did not intend to re-authorize local or State governments to impose motor carrier licensing, if done for safety rather than economic purposes, through enactment of § 14501(c)(2)(A). The Second Circuit's reading of § 14501(c) is entirely inconsistent with § 14501(c) and contravenes its express language, clear intent and purpose and renders its broad and unequivocal preemption of licensing by local and State government an absolute nullity.

Thus the conflict between the decision below and the Eleventh Circuit's decision in *City of Atlanta* goes well beyond whether local governments may continue to regulate motor carriers at all. The Court should grant certiorari to resolve the circuit conflict between the decision below and the Eleventh Circuit's decision in *City of Atlanta*.

III. THE DECISION BELOW HAS SIGNIFICANT POTENTIAL IMPACT AND COST TO MOTOR CARRIERS ACROSS THE COUNTRY

A. Unless Certiorari Is Granted, the Second Circuit's Decision Will Foster Additional Licensing of Towing Companies and Other Motor Carriers by Local as Well as State Governments

Currently towing companies across the country are subject to a number of local licensing laws, which would be preempted under the Eleventh Circuit's reading of § 14501 (c), but at this time remain in effect and are unlikely to be overturned in light of the Second Circuit's decision below. While the current licensing laws are not identical to one another, they nonetheless share a number of common elements. This is more than coincidence. The States, cities and other political subdivisions maintain an ongoing awareness, as they should, of statutory schemes used in other communities which are successful as well as have been upheld; they are also well aware of which ones have been struck down. If laws of a major jurisdiction, such as New York City, violate federal law but are nonetheless permitted to stand, other jurisdictions will follow suit and enact similar provisions. Thus there is an even greater likelihood that, if certiorari is not granted, the Second Circuit's decision will serve to provide strong encouragement and greater inducement for local governments throughout the country (as well as State governments) to enact similar motor carrier licensing and related safety-based laws.

Indeed, a Cincinnati law governing towing and wrecker operations, Chapter 869 of the Municipal Code, has served as the model and springboard for many of the local towing laws that currently exist throughout the country.[3] Cincin-

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[3] The Cincinnati was unsuccessfully challenged in 1992 prior to enactment of § 14510(c). *Interstate Towing v. City of Cincinnati,*

nati's law requires towing companies within a 25-mile radius of the city to obtain an operating license to provide any towing services initiated within the city. As a condition of obtaining the license, carriers must pay a fee. More importantly, however, carriers must also comply with the city's unique requirements governing insurance, bonding, vehicle equipment and vehicle inspections. While there are substantial additional requirements, for sake of brevity, the following are several examples of the degree to which such laws go in imposing requirements. Among other things, Cincinnati requires the carrier's insurance policy to contain "an endorsement providing 10 days' notice by the insurer to the city of Cincinnati prior to any material change or cancellation." The Cincinnati law also imposes 43 specific equipment requirements. These include specifications concerning the need for and a description of the type of ax ("single blade, long handled"), broom ("long handle, heavy duty push or standard broom"), tie rope ("at least 25 feet of heavy duty clothesline or sash cord or its equivalent"), and hand tools (standard mechanics hand tools, consisting of wrenches, pliers, screwdrivers) which carriers must carry. Cincinnati also requires vehicles to be equipped with "adequate mirrors affixed in usable position for driver so as not to impede vision to front or sides;" at least six, 30 minutes flares in a protective contained of choice;" and a "2½ lb. or more dry chemical type" fire extinguisher.

In holding that the Atlanta towing law was preempted by § 14501(c)(2)(A), the Eleventh Circuit explained that, "[b]y withholding the authority to enact safety and insurance regulations from political subdivisions, Congress ensured that counties and municipalities would not

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799 F. Supp. 805 (S.D. Ohio 1992), *aff'd*, 6 F.3d 1154 (6th Cir. 1993).

enact differing (and perhaps inconsistent) sets of safety and insurance ordinances," 158 F.3d at 546 (parenthetical in original). Therefore, in addition to the Cincinnati law, the following are examples of other current operating licenses which are representative of the types of dissimilar requirements being imposed by local governments around the country:

- Palm Beach County, Florida (County Ordinance No. 94-2): includes vehicle marking, inspection and insurance requirements; *e.g.*, insurance policies "must be endorsed to provide thirty (30) days notice by registered mail to [the County] of any material change, cancellation or expiration of policy;"

- Mansfield, Ohio (Section 763.02 of the Mansfield "Towing & Impounding Ordinance"): includes 24 equipment requirements; *e.g.*, the need for vehicles to be equipped with: a fire extinguisher "type ABC of at least five (5) pound capacity," at least six, 20 minute flares in a protective container of choice;" and "standard mechanics hand tools;"

- City of Oak Ridge North, Texas (Ordinance 016-97): includes insurance vehicle marking and equipment requirements; *e.g.*, at least one 10-pound or two 5-pound "standard BC type [fire] extinguishers with a gauge, properly filled and readily accessible for use; at least three flares "capable of being seen and distinguished at a distance of not less than a six hundred feet (600′) under normal atmospheric conditions at night;" at least one broom "of a type designed for pushing with an eighteen-inch head and a handle of not less than thirty-six inches;" at least one (1) flat-edged shovel of at least nine inches (9″), with a handle of not less than thirty-six inches;" permit holder's name and

telephone number must be displayed in three-inch letters, and holder's address in two-inch letters, on doors of vehicle;

- Cedar Rapids, Iowa (§ 52A.03 of City Code): includes ten vehicle inspection and equipment, vehicle marking, and insurance requirements; *e.g.*, requires ten days prior written notice of suspension or cancellation of insurance, and business name of company to "be affixed to vehicles and visible from a distance of 50 feet;"
- Blue Springs, Missouri (§ 630.330 of City Code): includes vehicle equipment and marking requirements; *e.g.*, name, address and telephone number of company must be legibly printed on side of vehicle in letters of not less than 1½ inches;
- Columbus, Ohio (Chapter 549 of the City Code): includes requirements for insurance, vehicle inspections and marking; *e.g.*, requires vehicle owner's name and trade name to be "painted on each side of tow truck in lettering at least four (4) inches in height."

Efforts by local governments to impose safety-based licensing and related requirements have not been restricted solely to towing companies, however. Non-resident motor carriers of passengers have similarly been the regulatory target of local government.

For example, in 1995 Washington, D.C. announced a plan to build a "Motor Coach Welcome Center." The City announced that it would construct a coach terminal on New York Avenue, where all non-resident motorcoaches were to be directed upon entry into the city. Passengers were to disembark and continue travel to their city destination by Metro rail, while each motorcoach was to receive a "safety inspection" which would result in the

issuance of a three-day visitors permit. The inspection was to consist of little more than a walk-around visual inspection of the vehicle and cost $95. A similar 90-day vehicle inspection for all non-resident carrier vehicles was in operation in Chicago between 1994 and 1996. Although the motorcoach industry has, to date, been successful in persuading local government to withdraw such requirements, similar success in the future has been made significantly problematic as a result of the Second Circuit's decision below.

Thus there is an even greater likelihood that, if certiorari is not granted, the Second Circuit's decision will provide strong encouragement and inducement for local governments throughout the country, as well as State governments, to enact similar motor carrier licensing and licensing related safety-based laws.

B. The Second Circuit's Decision Necessitates Continued and Costly Court Challenge of Local Licensing Laws on a Locality by Locality Basis to the Detriment of Industry but Also Local Government

Unlike many other statutes, such as the Americans With Disabilities Act, where the issue and outcome of litigation is highly fact-specific, the application of § 14501 (c)'s preemption of regulation by political subdivisions in any given case is not fact-specific. It is absolute. Local as well as State motor carrier licensing laws have been preempted.

Unless certiorari is granted, the decision below gives local jurisdictions a green light to follow the Second Circuit's view of preemption over the Eleventh Circuit, thereby perpetuating continued enforcement of existing local licensing laws and related requirements and at the same time facilitating new sets of regulations affecting not only towing companies but any motor carrier performing trans-

portation services within their borders. This, in turn, will necessitate industry having to continue its challenge of such existing and new laws on a locality by locality basis. *Amici* submit that § 14501(c) does not warrant such continued locality by locality litigation nor the significant costs and drain on the resources of industry, local governments and the courts that such litigation would impose.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 23, 1999

Supreme Court, U.S.
FILED
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No. 99-3

IN THE
SUPREME COURT OF THE UNITED STATES

ACE AUTO BODY & TOWING, LTD.; ATLAM TOWING SERVICE, INC.; BANGS TOWING, INC.; BEN'S TOWING SERVICE; BILL'S TOWING SERVICE; BRAGG TOWING CO.; BROADWAY AUTO SERVICE, INC.; C & J COLLISION SERVICE, INC.; CHARLES SCHMIDT AND SONS, INC.; CHESTER'S HIGHWAY GARAGE OF PW, INC.; CK TOWING, INC.; DAVE'S HEAVY TOWING, INC.; DO-RITE RELIABLE TOWING, INC.; EFFICIENCY ENTERPRISE, INC.; EAST COAST INDUSTRIAL UNIFORM CORP.; EASTERN UNIFORM SERVICE CORP.; F & B TRUCK REPAIR & MAINTENANCE, INC.; GALASSO TRUCKING, INC.; GESCO ICE CREAM VENDING, CORP.; HENDRICKSON TOWING, INC.,; KENNY'S FLEET MAINTENANCE, INC.; LEONARD AUTOBODY; MARJAM SUPPLY CO.; INC.; MODEL TOWING & RECOVERY, INC.; MURRAY RUDE SERVICES, INC.; PARKVIEW TOWING CORP.; PLAZA AMBULETTE SERVICE, INC.; RAPID ARMORED CORPORATION; SUNNY DAY ENTERPRISE INDUSTRIES, LTD.; TOMMY BUG AUTO REPAIRS, INC.; ULTIMATE TRANSPORT, INC.; and ZANT PRE, INC., d/b/a Present Glass,

Petitioners,

- against -

THE CITY OF NEW YORK,

Respondent..

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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19 pp

COUNTER-QUESTIONS PRESENTED

1. Whether this Court, having already denied certiorari in a prior case where the City of Atlanta sought Supreme Court review based on the conflict between the Second and Eleventh Circuits as to whether the safety exemption in 49 USC § 14501(c) extends to municipalities, should, in the absence of any further relevant developments, deny the instant petition, which seeks certiorari based on the same conflict between the Second and Eleventh Circuits?

2. Whether the Second Circuit correctly found that New York City's statutory and regulatory provisions governing towing fall within the safety and financial responsibility exceptions to federal preemption under Title VI?

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No. 99-3

IN THE
SUPREME COURT OF THE UNITED STATES

ACE AUTO BODY & TOWING, LTD. et al.,

Petitioners,

- against -

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The New York City towing laws.

In this action, petitioners, who are comprised of a group of towing businesses, autobody repair shops, and trucking companies that regularly contract with towing companies, challenge the constitutionality of the regulatory scheme of the City of New York ("the City") governing municipal towing.

The statutes of this scheme are codified in the City Administrative Code ("Administrative Code"), Title 20, Chapter 2, Subchapter 31, §§ 20-495 to 20-598. Regulations implementing these laws have been promulgated by the City's Department of Consumer Affairs and codified in the Rules of the City of New York ("RCNY"), Title 6, Chapter 2, Subchapter EE, §§ 2-361 to 2-367.

Under this scheme, all tow truck businesses and operators must be licensed by the City's Department of Consumer Affairs. Administrative Code § 20-496. Towing ordinances also govern matters such as tow truck safety and record-keeping procedures, and prescribe maximum rates for towing and storage. *See* Administrative Code § 20-501, 20-503, 20-507; 6 RCNY §§ 2-363, 2-365.

In addition to general requirements, the governing laws establish an accident management program known as the Directed Accident Response Program ("DARP"). In order to eliminate "accident chasing," *i.e.*, towers' practice of racing through traffic to be the first at an accident site, DARP restricts the towing of certain disabled vehicles to program participants summoned to accident scenes by the City's Police Department. Administrative Code § 20-518; 6 RCNY 2-371. In addition, the statutory scheme authorizes the Rotation Tow Program ("ROTOW"), also created to maintain safety on the streets. ROTOW designates certain towers on a rotating basis to remove from the streets vehicles thought to be stolen or abandoned, and certain other unattended vehicles. Administrative Code § 20-519; 6 RCNY 2-372.

Petitioners claim that the regulatory scheme is preempted by 49 USC § 14501(c). That statute provides that a state or municipality "may not enact or enforce a law . . . related to a

price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 USC § 14501(c)(1).

The City counters that the regulatory scheme falls within the federal statute's stated exceptions for ordinances related to safety and financial responsibility. Under § 14501(c)(2)(A), the preemption of state and local regulation does not

> restrict the safety regulatory authority of a State with respect to motor vehicles . . . or the authority of a State to regulate motor carriers with regard to the minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

Section 14501(c)(2)(C) provides that such preemption

> does not apply to the authority of a State or political subdivision of a State to enact or enforce a law . . . relating to the price of for-hire motor vehicle transportation by tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

B. Procedural history of this case.

In August 1996, petitioners commenced the instant action in the United States District Court for the Southern District of New York, challenging the aforementioned regulatory scheme as preempted by Title VI. Shortly thereafter, petitioners moved for a preliminary injunction. Although the complaint sought a declaration and injunction as to substantially all of New York City's regulatory scheme, petitioners specifically limited their motion for a preliminary injunction to the DARP

program and a demonstration program called Special Accident Response Districts ("SARD"), which was then in effect.

In a memorandum opinion and order dated April 25, 1997, the District Court denied petitioners' preliminary injunction motion, having determined that, while Title VI generally applies to municipal towing regulation, the City's DARP and SARD programs would likely fall within the safety exception to Title VI preemption. 1997 U.S. Dist. LEXIS 5683 at 8.

Thereafter, petitioners and the City of New York each moved for summary judgment (A43, A274).[1] In support of its motion, the City argued that, except insofar as it prescribes a maximum rate for consensual towing[2] -- that is, for towing in situations not governed by DARP, SARD, or ROTOW, where the vehicle owner has a choice as to who will tow the vehicle and thus an opportunity to negotiate the towing price -- the City's towing scheme does not violate Title VI. The City contended that the statutory and regulatory provisions regarding towing "price, route or service" fall within the aforementioned exceptions to the federal prohibition, as they are either addressed to public safety, financial responsibility, or non-consensual towing rates.

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[1] Numbers in parentheses preceded by the letter A refer to pages of the Joint Appendix submitted to the Court of Appeals.

[2] With regard to its prescription of a maximum rate for towing not governed by DARP, SARD, or ROTOW, the City conceded that such regulation is preempted by Title VI. The City contended, however, that to the extent that it preempts municipal rate regulation with respect to consensual tows, Title VI violates the Commerce Clause. This argument was rejected by both the District Court and the Court of Appeals. The City seeks no further review of this issue.

By memorandum and decision and order (one paper) dated October 27, 1997, the District Court (Cote, J.) granted the City's motion for summary judgment, and denied that of petitioners, to the extent of finding that, with the exception of regulations addressed to rates for consensual tows, the City's scheme governing the towing industry is exempt from preemption under § 14501(c)(2) of Title VI (A379-409). 1997 U.S. Dist. LEXIS 16679.

Petitioners appealed to the Court of Appeals for the Second Circuit, after which the City cross-appealed.[3]

C. The Court of Appeals decision.

By judgment dated March 26, 1999, the Court of Appeals affirmed the decision of the District Court. 171 F3d 765 (1999). Finding that § 14501(c) does not preempt the City's laws applicable to nonconsensual towing, the Court stated that "the statutory text, Congress' aim to leave the states' residual control over safety and other local concerns, and the presumption against preemption of historic state police power, argue against finding preemption where only incidental economic burdens can be discerned." *Id.* at 774.

Specifically, with regard to whether the DARP and ROTOW programs fall within the safety exemption, the Court rejected, as too narrow a reading of the federal law, petitioners' insistence "that the exemption extends only to

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[3] The cross-appeal sought review of the District Court's determination related to the constitutionality of the City's laws governing consensual towing. As already noted, this issue is unrelated to the instant petition for certiorari.

safety regulation of the mechanical components of motor vehicles. . . ." *Id.* Accordingly, by addressing the hazards posed by "chasing" and by the presence of abandoned vehicles in the streets, DARP and ROTOW fall fully within the ambit of the safety exemption.

Similarly, the Court found, the safety exemption covers the licensing and repair requirements in the City's scheme. As to the laws and regulations directed at storage and repair, the Court held that such provisions reasonably relate to safety concerns in that "a disabled motor vehicle clearly presents a safety hazard in a municipality where vehicular traffic is so heavy, and the City has an obligation to make arrangements for its removal from the road and to place it in safe-keeping." *Id.* at 777.

In addition, the Court found that the regulation of rates for nonconsensual towing falls squarely within the exemption created by "the plain language of § 14501(c)(20(C)[, which] clearly encompasses any tow 'performed without the prior consent or authorization of the owner or operator of the motor vehicle,' regardless of the reason for the lack of consent." *Id.* at 777-78.

Finally, the Court acknowledged that its holding with regard to the scope of the exemption is contrary to that of *R. Mayer of Atlanta, Inc. v. City of Atlanta*, 158 F3d 538 (11th Cir. 1998), in which the Eleventh Circuit held that 14501(c)(2)(A) exempts only State regulatory authority and does not extend to municipalities or other political subdivisions. Arguing against the position adopted by the Eleventh Circuit, the Court stated, 171 F3d at 775-76:

. . . Granted, the text of 14501(c)(2)(A), unlike other subsections of 14501, fails to preserve explicitly the regulatory authority of the political subdivisions of the state. But we see no reason to construe this language to prevent the state from delegating its regulatory authority to a municipality. To the contrary, the legislative history indicates that state safety regulatory authority (including, presumably, the authority to delegate) was to be "unaffected" by the preemption statute. . . .

Further, although the legislative history clearly illustrates Congress' deregulatory purpose, the history is ambiguous as to the scope of that purpose. More particularly, the reports issued in connection with § 14501 suggest that its primary purpose was to eliminate local economic regulation, not local safety regulation. [Citation omitted.] To the extent that the scope of Congress' purpose is unclear, we hesitate to construe the text of 14501 so as to frustrate unnecessarily the ability of municipalities to respond to the local safety concerns created by local towing industries. . . .

RELEVANT PROVISIONS OF LAW

The federal statutory language at issue in this case is contained in 49 USC § 14501(c), which provides in pertinent part:

(1) Except as provided in paragraph (2) . . . a State, political subdivision of a State, . . . may not enact a law, regulation or other provision having the force and effect of law related to a price, route or service of any motor carrier . . . with respect to the transportation of property.

(2) Matters not covered. - Paragraph (1) -

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, . . . or the authority of a State to regulate with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

* * * *

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.

REASONS FOR DENYING THE WRIT

A. BY DECLINING TO GRANT CERTIORARI IN *R. MAYER OF ATLANTA V. CITY OF ATLANTA*, THIS COURT HAS ALREADY FOUND THAT THE CONFLICT BETWEEN THE SECOND AND ELEVENTH CIRCUITS IS AN INSUFFICIENT BASIS FOR SUPREME COURT REVIEW.

Petitioners argue that this Court should grant a writ of certiorari in order to resolve the split between the Second Circuit decision in this case and the decision of the Eleventh Circuit in *R. Mayer of Atlanta v. City of Atlanta,* 158 F3d 538 (11th Cir. 1998). The Eleventh Circuit held in *Mayer* that the safety exemption in § 14501(c)(2)(A) applies only to the State

itself and does not extend to municipalities or other political subdivisions. *Id.* at 545. In the instant case, the Second Circuit explicitly rejected the Eleventh Circuit's holding, and upheld those provision of the City's regulatory scheme directed at ensuring that towing is carried out safely. 171 F3d at 775-76.

This dispute between two judicial circuits is not in itself sufficient to warrant Supreme Court review of this case. Although Rule 10 of the Rules of the Supreme Courts lists a conflict between courts of appeal as one of the relevant considerations in determining whether to grant certiorari, the same Rule explicitly states that such considerations are not controlling and do not limit the Court's discretion. *See also, Beaulieu v. United States*, 497 US 1038 (1990) (White, J., dissenting) ("[I]t also regularly happens that certiorari is denied in . . . cases presenting the kinds of conflicts singled out by Rule 10"). Former Justice Byron White noted that among the grounds for denying certiorari in such instances is that "the conflict is 'tolerable' or 'narrow,' or because other courts of appeals should have the opportunity to weigh in on one side or another of the unsettled issue." *Id.*

As it happens, this Court has already denied a recent petition for certiorari in *Mayer*. An initial petition for certiorari was filed by the City of Atlanta, prior to the Second Circuit decision in the instant case, and denied on March 29, 1999. ___ US ___; 119 S.Ct. 1334. Following the Second Circuit decision, the City of Atlanta petitioned for a rehearing. This Court denied that motion on May 24, 1999. ___ US ___; 119 S. Ct. 1799. Thus, this Court has already determined that the split between the Second and Eleventh Circuits, on the issue of whether the exemption if § 14501(c) applies to municipalities, is not in itself sufficient reason for review.

Petitioners point to no subsequent developments that should cause this Court to change its mind.[4]

B. THROUGHOUT THIS LITIGATION, PETITIONERS HAVE CONSISTENTLY FAILED TO DEMONSTRATE THAT THE CITY'S REGULATORY PROVISIONS DESIGNED TO ELIMINATE "ACCIDENT CHASING" GO BEYOND THE SCOPE OF THE SAFETY EXEMPTION OF § 14501(c).

Petitioners make the conclusory assertion that the City's provisions governing nonconsensual towing are merely "cloaked as a safety regulation" designed to prevent "accident chasing," the practice by towers of rushing to be the first at the scene of an accident in order to compete for business. Pet. at 10. Neither in their papers below nor in their instant Petition do petitioners refute the City's assertion that chasing poses a serious public hazard. Instead, they complain that "[u]nder the express terms of the City's ordinance, members of the public may never call upon their own tower to respond to the accident." Pet. at 10. This argument fails to acknowledge the hazards that result if the removal of a disabled vehicle from an accident site becomes a private matter

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[4] Of the towing cases cited by petitioners as pending in other circuits (Pet. at 7-8), the only one so far to have produced a court of appeals decision is *Cardinal Towing & Auto Repair, Inc. et al. v. City of Buford Texas, et al.*, 1999 U.S. App. LEXIS 16865. The Fifth Circuit there held that the contract between the defendant municipality and an individual tower "does not constitute a law, regulation, or provision having the force and effect of law under section 14501(c)." *Id* at 9. This holding has no bearing on the split between the Second and Eleventh Circuits over the alleged preemption of municipal provisions that do have the effect of law.

between and the vehicle's owner and a tower. Only by a comprehensive system such as DARP can the City ensure the quick removal of disabled vehicles from the streets and control the threat to public safey that such vehicles pose.

Moreover, petitioners's contention that Congress's purpose was to maximize competition even with regard to nonconsensual towing (Pet. at 10-11) is rendered absurd by the express exemption contained in § 14501(c(2)(C). That provision authorizes the State to regulate "the price of for-hire motor vehicle transportation by tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle."

Throughout this litigation, plaintiffs have failed entirely to demonstrate that the provisions governing DARP and ROTOW extend beyond the scope of safety regulation. Their contention that these programs violate the Congressional mandate by unduly limiting competition is therefore without basis.

C. THE CITY'S PROVISIONS GOVERNING NONCONSENSUAL TOWING RELATE TO SITUATIONS IN WHICH TOWING IS REQUIRED FOLLOWING AN ACCIDENT. THESE PROVISIONS ARE DIRECTED AT SAFETY HAZARDS THAT ARISE FROM THE NEED FOR TOWING AND NOT FROM ANY OTHER ASPECT OF THE PRECIPITATING ACCIDENT. THE ONLY RELEVANT MEASURE OF THE SEVERITY OF THE ACCIDENT IS WHETHER IT RESULTS IN A VEHICLE HAVING TO BE TOWED. PETITIONERS' ASSERTION THAT THE CITY VIOLATES A PROPERTY RIGHT BY FAILING TO CONSIDER THE "SIZE OR SEVERITY" OF THE ACCIDENT IS, THEREFORE, WITHOUT BASIS.

Similarly unavailing is petitioners' contention that the City's towing scheme violates a property right created by Congress. Pet. at 11. Petitioners concede that the City "may have a limited right to control the price of nonconsensual towing, which might also include the right to select and dispatch tow trucks to respond to emergency situations." Pet. at 11. But they object to the City's "unlimited control over all towing following an accident, without regard to the accident's size or severity." Pet. at 11.

For the purposes of this case, the only relevant measure of the "size or severity" of an accident is whether the mishap results in a vehicle having to be towed. Absent regulation, a vehicle disabled in a minor accident creates no less of a chasing hazard than a vehicle destroyed in a major crash.

So long as the City's towing ordinances are reasonably aimed at preserving safety, they fall within the federal

exemption and may not be deemed to violate a property right. Neither on this issue nor any other should certiorari be granted in this case.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED, WITH COSTS.

Respectfully submitted,

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